Petition

81-1781

Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1981

SOLEBURY TOWNSHIP, SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, J. WALTER LIVEZEY, JR., FRANK J. SORIERO, JR., FRANK C. BOAS, CYRUS R. HOAGLAND and PATRICIA D. KNIGHT, Individually and in Their Respective Official Capacities as Members of the SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, CARL L. LINDSAY, JR., Individually and in His Official Capacity as Solicitor of SOLEBURY TOWNSHIP, and WILLIAM E. MOON,

Petitioners

v.

HERITAGE FARMS, INC., HERITAGE FARM PARTNERSHIP, CONCEPTS PLUS, INC. and MICHAEL G. LAMELZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANKLIN POUL
BRIAN P. FLAHERTY
STEPHEN B. HARRIS
EDWARD J. MARCANTONIO
Attorneys for Appellees

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor, Packard Building
Philadelphia, Pennsylvania 19102

HARRIS & HARRIS
P. O. Box 160
Warrington, Pennsylvania 18976

SWARTZ, CAMPBELL & DETWEILER
1724-30 PNB Building
Philadelphia, Pennsylvania 19107

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

When a controversy over a series of land use issues, all capable of being resolved under the detailed land use regulation system of the state, gives rise to an action under the Civil Rights Act of 1871, 42 U. S. C. § 1983 (1981), based on allegations that the decisions of the defendant township and officials were intended to deprive plaintiff developers of their constitutional rights, does the District Court have discretion to abstain from the exercise of jurisdiction until such time as the state courts have had the opportunity to resolve the underlying land use issues.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

A. Introduction 4

B. Statement of Fact 5

REASONS FOR GRANTING THE WRIT 12

a. The Court of Appeals' Decision Is Predicated on a Mechanical View of Abstention Not Consistent With the Decisions of This Court 12

b. The Court of Appeals' Decision Did Not Take Into Account the Fact That a Series of Complex Land Use Issues Underlie Plaintiffs' Claims and in That Respect Is Inconsistent With Decisions of Several Other Courts of Appeals 16

APPENDIX:

Opinion of the United States Court of Appeals for the Third Circuit A1

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania A11

Judgment Order of the United States Court of Appeals for the Third Circuit Sought to Be Reviewed A19

Complaint A21

TABLE OF CONTENTS (Continued)

Page

Defendants' Motion to Dismiss on the Ground That the Court Should Abstain From Exercising Its Jurisdiction, or, in the Alternative to Dismiss the Damage Claim Against the Individual Defendants A39

Affidavit of Carl L. Lindsay, Jr. (Without Exhibits) A40

Affidavit of Edwin C. Angstadt (Without Exhibits) A44

The Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10101, et seq. (Purdon 1972) .. A53

TABLE OF CONTENTS (Continued)

Page

Defendants' Motion to Dismiss on the Ground That the Court Should Abstain From Exercising Its Jurisdiction, or, in the Alternative to Dismiss the Damage Claim Against the Individual Defendants A39

Affidavit of Carl L. Lindsay, Jr. (Without Exhibits) A40

Affidavit of Edwin C. Angstadt (Without Exhibits) A44

The Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10101, et seq. (Purdon 1972) .. A53

TABLE OF AUTHORITIES

Cases: Page

Beck v. California, 479 F. Supp. 392 (C. D. Cal. 1979) 19
Besig v. Friend, 463 F. Supp. 1053 (N. D. Cal. 1979) 19
Burford v. Sun Oil Co., 319 U. S. 315 (1943) 13, 14, 16
Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) 12, 14, 15
Dells, Inc. v. Mundt, 400 F. Supp. 1293 (S. D. N. Y. 1975) .. 19
Fair Assessment in Real Estate Association, Inc. v. McNary, 102 S. Ct. 177 (1981) 13, 18
Forrest Hills Utility Company v. Heath, Ohio, 539 F. 2d 592 (6th Cir. 1976) 19
Fralin and Waldron, Inc. v. Martinsville, Virginia, 493 F. 2d 481 (4th Cir. 1974) 13, 14
Hill v. El Paso, Texas, 437 F. 2d 352 (5th Cir. 1971) 18
Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978) 14, 20
Railroad Commission of Texas v. Pullman, 312 U. S. 496 (1941) 12, 13, 14, 16
Resources for Human Development, Inc. v. Furber, 387 F. Supp. 11 (E. D. Pa. 1975) 19
Salvati v. Dale, 364 F. Supp. 691 (W. D. Pa. 1973) 19
Santa Fe Land Improvement Company v. Chula Vista, 596 F. 2d 838 (9th Cir. 1979) 14, 19
Santasucci v. Gallen, 607 F. 2d 527 (1st Cir. 1979) 17
Sederquist v. Triburon, 590 F. 2d 278 (9th Cir. 1978) 19
Stallworth v. Monroeville, 426 F. Supp. 236 (S. D. Ala. 1976) 19
Webber v. Skoko, 432 F. Supp. 810 (D. Or. 1977) 19

TABLE OF AUTHORITIES (Continued)

Statutes: Page

Civil Rights Act of 1871, 42 U. S. C. § 1983 (1981) ....i, 1, 4

28 U. S. C.:

  § 1291 5

  § 1331 4

  § 1254(1) i

2 Pa. Cons. Stat. Ann. § 752 (Purdon 1981) 1, 6

42 Pa. Cons. Stat. Ann § 762 (Purdon 1981) 1

42 Pa. Cons. Stat. Ann. § 933 (Purdon 1981) 3, 6

The Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10101, et seq. (Purdon 1972) ..3, 5, 9, 10, 11, 15

Other Authorities:

Land Use Regulation, The Federal Courts and The Abstention Doctrine, 89 Yale L. J. 1134 (1980) 20

Rule 19.2, Supreme Court 8

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 507 F. Supp. 33. The opinion of the United States Court of Appeals for the Third Circuit is not yet officially reported.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The United States Court of Appeals for the Third Circuit entered its judgment reversing the decision of the District Court on February 10, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1966).

STATUTES INVOLVED

The Civil Rights Act of 1871, 42 U. S. C. § 1983 (1981)

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Pennsylvania Statutes Vesting Jurisdiction as to Land Use Disputes

2 Pa. Cons. Stat. Ann. § 752 (Purdon 1981)

> Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).

42 Pa. Cons. Stat. Ann. § 762(a)(4) (Purdon 1982)

> (a) *General rule.* Except as provided in subsection (b), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:
>
> * * *
>
> (4) Local government civil and criminal matters.
>
> (i) All actions or proceedings arising under any municipality, institution, district, public school, planning or zoning code or under which a municipality or other political subdivision or municipality authority may be formed or incorporated or where is drawn in question the application, interpretation or enforcement of any:
>
> (A) statute regulating the affairs of political subdivisions, municipality and other local authorities or other public corporations or of the officers, employees or agents thereof, acting in their official capacity;
>
> (B) home rule charter or local ordinance or resolution; or

(C) statute relating to elections, campaign financing or other election procedures.

(ii) All appeals from government agencies other than Commonwealth agencies decided under section 933 or otherwise.

* * *

42 Pa. Cons. Stat. Ann. § 933(a)(2) (Purdon 1981)

(a) *General rule.* Except as otherwise prescribed by any general rule adopted pursuant to section 503 (relating to reassignment of matters), each court of common pleas shall have jurisdiction of appeals from final orders of government agencies in the following cases:

* * *

(2) Appeals from government agencies, except Commonwealth agencies, under Subchapter B of Chapter 7 of Title 2 (relating to judicial review of local agency action) or otherwise.

* * *

The Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53, ʃ 10101, et seq. (Purdon 1972)

The provisions of this statute are too lengthy to set forth herein. The statute is set forth in its entirety in the Appendix hereto at pp. A53-A144.

STATEMENT OF THE CASE

A. Introduction

Plaintiffs are land developers who complain that past and present Solebury Township officials have illegally sought to hinder development of their land use projects, thereby allegedly violating plaintiffs' rights to due process and equal protection under the United States Constitution. Plaintiffs also allege that they have been deprived of certain rights guaranteed by the Pennsylvania Constitution and other Pennsylvania statutes.[1]

The first four counts of the complaint allege that defendants have violated the Civil Rights Act of 1871, 42 U. S. C. § 1983 (1981) ("§ 1983"), which creates a private right of action to redress the deprivation under color of state law of any rights, privileges or immunities secured by the Constitution. In the other five counts of the complaint, plaintiffs allege that defendants have, by the same conduct, violated Pennsylvania law. Plaintiff's state law claims are that defendants have violated the Pennsylvania Constitution in that they have denied plaintiffs the beneficial use and enjoyment of their properties, and that they have tortiously interfered with plaintiff's contractual relations, and committed fraud, and extortion.[2] (The complaint is printed in the Appendix hereto. See *infra* at A21-A138.)

As relief, plaintiffs seek an injunction barring any of the defendants from further violation of law with respect to plaintiffs' projects, declaratory relief and compensatory and punitive damages.

---

[1] In addition to Solebury Township itself, plaintiffs named as defendants the members of the Township's Board of Supervisors, one of its past members, and the Township's Solicitor. All of the individual defendants were named in their official and individual capacities.

[2] The jurisdiction of the District Court was based upon the existence of a federal question. 28 U. S. C. § 1331 (1966).

Defendants moved to dismiss the complaint on the ground of abstention or, in the alternative, to dismiss the claims against the individual defendants on the ground that they were immune from liability. On December 19, 1980, Judge Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania granted defendants Motion to Dismiss on the ground of abstention, dismissing the complaint without prejudice, with leave to plaintiff to reinstate upon final adjudication by a state court of state law questions.

Plaintiffs appealed from this Order to the United States Court of Appeals for the Third Circuit which, on February 10, 1982, reversed the judgment of the District Court.[3]

B. Statement of Facts

1. *The Pennsylvania Municipalities Planning Code.*

The primary allegations of the complaint can be fully understood only in the context of the comprehensive plan for control of land development now in force in Pennsylvania. This appears in the Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10101, et seq. (Purdon 1972) ("MPC"), which balances the interests of the local community against the interests of those who seek to develop or modify land. Under the MPC, local governments are authorized to regulate land use within their boundaries. (The MPC, as amended, is printed in its entirety in the Appendix hereto. See *infra* at A53-A144.)

As stated in Section 105 of the Act, Pa. Stat. Ann. tit. 53, § 10105 (Purdon 1972),

---

[3] The jurisdiction of the Court of Appeals was based upon its plenary appellate jurisdiction. 28 U. S. C. § 1291 (1966).

> It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities, other than cities of the first and second class; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit municipalities, other than cities of the first class, to minimize such problems as may presently exist or which may be foreseen. . . .

The Act goes on to specify, in nine more articles, the powers that may be exercised by a municipality in regulating land development within its borders.

Thus, Pennsylvania has in effect a comprehensive system for governing the development of land within its borders. That system is enforced through Pennsylvania's courts—in the first instance by the courts of Common Pleas of the several counties. See 42 Pa. Cons. Stat. Ann. § 933(a)(2) (Purdon 1981) and 2 Pa. Cons. Stat. Ann. § 752 (Purdon 1981). Appeals are to be heard by the Commonwealth Court, whose special function, among other things, is to review lower court decisions regarding issues arising under the local ordinances such as those whose enactment is authorized by the MPC. See 42 Pa. Cons. Stat. Ann. § 762(a)(4) (Purdon 1981).

2. *Plaintiffs' Complaint.*

It is essentially plaintiffs' contention that the Township has not followed the requirements of the MPC in dealing with plaintiffs' several land development proposals, and that plaintiffs have consequently been deprived of their constitutional rights.

A review of the complaint reveals allegations of seven specific instances in which defendants have allegedly acted improperly. The allegations reflect a preference for characterization at the expense of explanation. As a result, a casual reading of the complaint reveals that plaintiffs consider defendants' decisions and actions to be spurious, baseless, unwarranted, malicious, illegal, arbitrary, unreasonable, confiscatory, discriminatory (to say nothing of excessive, unauthorized and punitive), but leaves rather vague the nature of the issues being decided by defendants in this extraordinary way. Accordingly, defendants submitted in support of their motion to abstain the Affidavit of Carl L. Lindsay, Jr., the Township Solicitor of Solebury, to explain the facts with respect to each dispute underlying the complaint. Plaintiff responded with the affidavit of Edwin C. Angstadt, Jr., who had represented plaintiffs in connection with matters giving rise to the controversy. Obviously these affidavits give very different versions of the behavior of the parties, but the Angstadt affidavit in no way rebuts the Lindsay statement of the nature of the underlying land use issues. Equally obviously, defendants do not rely on the affidavits as establishing ultimate rights or wrongs: their function is to illuminate the underlying disputes and help the Court gain a realistic sense of the nature of the controversies which must be grappled with in the process of determining whether defendants were indeed acting unreasonably to the point of trampling plaintiffs' constitutional rights.[4]

---

[4] Plaintiffs do make some additional specific allegations of conduct beyond the actions taken pursuant to the resolution of the controversies described in the affidavits. However, those additional allegations relate to instances in which defendants have allegedly expressed an animus towards defendants, not to actions which are or could be alleged to constitute a deprivation of plaintiff's constitutional rights in and of themselves.

In this petition a lengthy recitation of the facts underlying the several disputes would be inappropriate. Petitioners have, therefore, appended hereto the Complaint and the affidavits of Messrs. Lindsay and Angstadt.[5] (See *infra* at A40, A52.) In the body of this petition only two examples of the types of disputes involved are offered as examples.

The Limeport I Escrow Funds Dispute[6]

In Paragraph 30 of the complaint, plaintiffs allege that defendants "unlawfully, willfully and maliciously denied Heritage [Farm] Partnership the proper, required and necessary release of funds from escrow to pay for the roadway construction work completed at that time. . . ."

This dispute as well is one within the ambit of the regulatory scheme established by the legislature to govern land use, and, in fact, is already the subject of a lawsuit brought in the Bucks County Court of Common Pleas.[7]

On June 1, 1976, Heritage Farm Partnership ("Heritage Farm") entered into an Escrow Agreement with the Township and Newtown Savings Bank, pursuant to which Heritage Farm placed $263,717.43 in an escrow account at Newtown Savings Bank in order to guarantee proper construction of certain improvements forming part of the

---

[5] The Lindsay and Angstadt affidavits referred to numerous exhibits which were appended thereto. Those exhibits are not reproduced in the Appendix hereto because of their length and because of printing difficulties. Pursuant to Rule 19.2 of this Court, however, the appendix prepared by the parties in the Court of Appeals, which contains the affidavits and the exhibits appended thereto, has been certified to the Clerk of the Supreme Court by the Clerk of the Court of Appeals for the Third Circuit.

[6] "Limeport I" is the name of a housing development undertaken by one of the plaintiffs.

[7] See Paragraph 4 of the Affidavit of Carl L. Lindsay ("Lindsay Affidavit") and Paragraphs 9-12 of the Affidavit of Edwin C. Angstadt ("Angstadt Affidavit").

Limeport I project. This procedure for assuring the completion of improvements in a land development project is one sanctioned by Section 509 of the MPC, Pa. Stat. Ann. tit. 53, § 10509 (Purdon 1972), which provides that,

> In lieu of the completion of any improvements required as a condition for the final approval of a plat, the subdivision and land development ordinance may provide for the deposit with the municipality of a corporate bond, or other security acceptable to the governing body in an amount sufficient to cover costs of any improvements which may be required. . . .

The subject of when funds held pursuant to such an escrow agreement must be released is one expressly covered in Section 510 of the MPC, Pa. Stat. Ann. tit. 53, § 10510 (Purdon 1972), which provides that:

> (a) When the developer has completed all of the necessary and appropriate improvements, the developer shall notify the municipal governing body, in writing, by certified or registered mail, of the completion of the aforesaid improvements and shall send a copy thereof to the municipal engineer. The municipal governing body shall, within ten days after receipt of such notice, direct and authorize the municipal engineer to inspect all of the aforesaid improvements. The municipal engineer shall, thereupon, file a report, in writing, with the municipal governing body, and shall promptly mail a copy of the same to the developer by certified or registered mail. The report shall be made and mailed within thirty days after receipt by the municipal engineer of the aforesaid authorization from the governing body, said report shall be detailed and shall indicate approval or rejection of said improvements, either in whole or in part, and if said improvements, or any

> portion thereof, shall not be approved or shall be rejected by the municipal engineer, said report shall contain a statement of reasons for such nonapproval or rejection . . . .

Thus, if Heritage Farm had wished to press the issue of release of Limeport I escrow funds it could have done so pursuant to the mechanism provided in Section 510 of the MPC by the Pennsylvania legislature. It did not.

Furthermore, this dispute is already the subject of a lawsuit in the Bucks County Court of Common Pleas. Before completion of the project, two of the contractors who performed services for Heritage Farm in connection with the development, Explo-Tech, Inc. and Urban Industries, Inc., brought suit against Michael Lamelza, as general partner in Heritage Partnership, and Solebury Township seeking payment of a total of $94,716.70 allegedly due to the contractors for the work they had performed. The project remains unfinished, and, in the opinion of the Township Engineer, a total of approximately $65,925.00 is needed in order to finish it.

The total of the liability to which Solebury Township is exposed in the two suits and the amount which must be expended to complete the project is far in excess of the amount remaining in the escrow fund, which is $117,395.75. Accordingly, Solebury Township has instituted a suit in equity against Lamelza and the two contractors who brought suit against it in an effort to resolve the dispute. *Solebury Township v. Michael Lamelza, et al.*, No. 80-5899-12-5. As relief, the Township is asking that Lamelza be required to finish all of the improvements whose completion is assured by the Escrow Agreement or, in the alternative, that the Township be authorized to use the escrow funds to complete the public improvements.

Laurel Hill Escrow Agreement Dispute

Plaintiffs allege in Paragraph 36 of the complaint that "[d]efendant Lindsay, acting individually and in combination and conspiracy with the remaining defendants, has frustrated, obstructed, and prevented the Laurel Hill proposed subdivision from being approved and started by willfully, maliciously and purposefully embodying illegal additional conditions of approval upon the plans and delaying transmission and execution of required approval documents beyond the stated commitment dates for financing secured by plaintiff Concepts [Plus, Inc.] which resulted in the loss of such commitments and subsequent default by Concepts on its agreement of sale for the property".

The facts relating to this allegation are as follows:[8] In February of 1980, the Board of Supervisors approved the Laurel Hill subdivision plan for development, conditional upon the entry into an agreement, pursuant to § 509 of the MPC, Pa. Stat. Ann. tit. 53, § 10509 (Purdon 1972) to secure completion of the improvements to be constructed in the subdivision. In accordance with the condition upon the Board's approval, the Township Solicitor, defendant Lindsay, then prepared and submitted to Concepts Plus, Inc. ("Concepts"), the developer of Laurel Hill, an escrow agreement and a development agreement. Concepts and the Township have been unable to reach agreement as to the terms of the agreements, and Concepts has contended that the agreements proposed by the Township are unlawful in that they impose an additional requirement on subdivision approval, in violation of the MPC.

---

[8] See Paragraph 9 of Lindsay Affidavit and Paragraphs 31-38 of the Angstadt Affidavit.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because, on an issue of great importance to the administration of federal courts and to the proper relationship between the federal government and the several states, the Court of Appeals

(a) misapplied the cases decided by this Court on the issue of abstention, and

(b) rendered a decision in conflict with the decisions of other federal courts on the same matter.

a. The Court of Appeals' Decision Is Predicated on a Mechanical View of Abstention Not Consistent With the Decisions of This Court.

The Court of Appeal below adhered to an exceedingly narrow view of the bounds of abstention, restricting it to three specific types of circumstances. In so doing it purported to invoke the holding of this Court in *Colorado River Water Conservation District v. United States,* 424 U. S. 800 (1976). That case may reasonably be interpreted as not merely grouping by categories the types of existing abstention precedents, but as, by *dictum,* limiting the abstention doctrine to those groups. 424 U. S. at 814. There is nothing in *Colorado River,* however, that justifies treating it like a statutory codification, requiring a precise matching of future abstention cases to the situations in the earlier cases. This would be inconsistent with the very cases cited, since these were expressly decided as particular manifestations of general principle of accommodation to state interests in the spirit of federalism. See e.g., *Railroad Commission of Texas v. Pullman Co.,* 312 U. S. 496, 645 (1941) ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.") Cf. *Fair Assessment in Real Estate Association, Inc. v. McNary,* 102 S. Ct. 177, 179 (1981).

By any reasonably flexible standard of interpretation, the District Court's determination that both *Railroad Commission of Texas v. Pullman,* 312 U. S. 496 (1941) and *Burford v. Sun Oil Co.,* 319 U. S. 315 (1943) types of abstention were applicable was clearly correct.

In its opinion, the District Court said:

> *Pullman*-type abstention is appropriate here because this dispute can be disposed of by a state court applying state law, thus avoiding a determination by this court of federal constitutional questions. *See, Lewellyn v. Gerhardt,* 513 F. 2d 184 (7th Cir. 1975). Indeed, as was stated in that case, "[t]he case before us appears to be a classic *Pullman*-type abstention case because there is presented in addition to the alleged federal claim an unsettled issue of state law which is capable of superseding altogether the federal question". *Id.* at 187. (footnote omitted). In addition to their federal constitutional claims, plaintiffs here have asserted claims based upon the Constitution and laws of the Commonwealth of Pennsylvania. Those state claims arise from the same alleged conduct of defendants and seek the same relief as do their federal constitutional claims. A state court hearing those state claims might well dispose of this matter without the need to address federal constitutional issues. *Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 492 F. 2d 481 (4th Cir. 1974) (Opinion by Mr. Justice Tom Clark). Since there is a potentially dis-

> positive question of state law, abstention is warranted in this case. *See, Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F. 2d 838 (9th Cir. 1979).
>
> *Burford*-type abstention is also appropriate because of the traditionally local nature of land use decisions and the danger of unwarranted federal interference with such traditionally local functions. *See, Kent Island Joint Venture v. Smith,* 452 F. 2d at 463. A state adjudication here may well avoid needless friction in federal state relations over the administration of purely state affairs. *Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 493 F. 2d at 482-83.

The Court of Appeals rejected the District Court's reliance on *Pullman* on the theory that no "unsettled" aspect of state law had been pointed out. The affidavits submitted showed that the District Court was faced with a series of disputes referable to an elaborate statute which has received very little interpretation. Since the precise contours of the resultant legal issues would have to await considerable sifting of fact, it was impossible to point to some overriding clear-cut dispositive "unsettled" issue of law. On the other hand, it was plain enough—and surely within the province of the trial judge to infer—that before the constitutional issues could be properly addressed, the District Court would find itself engaged in a pioneering role of interpretation of a complex code of municipal land use regulation. This situation in principle obviously calls for abstention for the very same reasons as a case involving a single overriding legal issue which can be seen as potentially dispositive at the outset. The Court of Appeals did not even address the point however. It matched the case against *Pullman,* found an element missing and therefore held that abstention was precluded by *Colorado River.*

With respect to *Burford* type abstention the Court of Appeals drew a distinction between the statewide regulation of oil wells in the *Burford* case itself and the local supervision of land use provided for in the Pennsylvania Municipalities Planning Code. Here again the interest of Pennsylvania in the sensitive issue of the implementation of local control over land use is ignored.[9] Instead the state interests involved were rejected simply because they were not the same as those in *Burford*.

In connection with *Burford* abstention the Court of Appeals also added an additional unjustifiable gloss on *Colorado*.

> Perhaps most importantly, this case is not simply a land use case. Rather the plaintiffs have alleged that members of the Board have used their governmental offices to further an illegal conspiracy to destroy plaintiffs' constitutional rights to conduct a legitimate business. The Pennsylvania Municipalities Planning Code simply does not address such behavior. Nor do we think that defamation and attempting to persuade financial institutions not to lend to the appellants are simple matters of land use and development policy. In short, *Burford* abstention has no place in this case.

In net effect the decision of the Court of Appeals offers immunity from the abstention doctrine—regardless of the delicacy of the federal-state relations involved—to any plaintiff prepared to allege in sufficiently strident fashion the bad faith, corrupt motives or conspiratorial behavior of the defendants.

---

[9] As shown by the Pennsylvania Municipalities Planning Code, Pennsylvania was here dealing with the critically important tension between the right of existing residents to a measure of home rule, and the concern of the state to avoid arbitrary restrictions on the evolution of land development programs.

b. The Court of Appeals' Decision Did Not Take Into Account the Fact That a Series of Complex Land Use Issues Underlie Plaintiffs' Claims and in That Respect Is Inconsistent With Decisions of Several Other Courts of Appeals.

Precisely the sort of consideration that is relevant to the question of whether or not a court should abstain is the presence of absence of issues which are traditionally the subject of state law. In this case the district court did consider special nature of this case presented by the involvement of state land use issues, saying,

> Cases involving questions of land use policy have consistently been considered especially appropriate for abstention because of the distinctly local nature of land use regulation and the special sensitivity which surround land use issues . . . . Justification for abstention in land use cases is based upon the principles of the *Pullman* and *Burford* . . . . State courts are more accustomed to reviewing local land use decisions, and federal adjudication of land use disputes could cause needless conflict with state and local administration of concerns with which state courts have more familiarity and expertise. . . . (Citations omitted.)

Following that recognition of the special nature of the disputes underlying the lawsuit, the district court went on to apply the guidelines for application of the *Pullman* and *Burford* types of abstention and found they were warranted. Contrary to what the Court of Appeals asserted in its opinion, the presence of a land use dispute did not "trigger a mechanical decision to abstain," on the part of the District Court. The District Court instead considered the impact of premature intervention on sensitively balanced application of state land use policies. In so doing the district court was following a virtually unanimous chorus of federal appellate and district court decisions.[10]

First Circuit:

Santasucci v. Gallen, 607 F. 2d 527 (1st Cir. 1979). Plaintiffs alleged that land on which they wished to conduct a demonstration had never been properly conveyed by the state to its purported private owner and, therefore, that they had a constitutional right to demonstrate thereon. The court said:

> While not essential to our decision, two other factors bolster our conclusion that the district court's decision to abstain was proper. First, the questions of state law raised here relate to subjects of special local concern: title to land and the validity of property conveyances by town authorities. Second, apart from other potential state remedies which undoubtedly exist, an ongoing action in the state Superior Court provides appellants with a ready forum for resolution of their claims. 607 F. 2d at 529.

---

[10] Just this term this Court has recognized in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 102 S. Ct. 177 (1981), that suits alleging some constitutional defect in the administration of a state created system are particularly likely candidates for federal court deference to state courts. There, the Court dismissed a claim that a state tax system was administered in violation of the United States Constitution, upholding a line of cases which, the court said, "reflect the fundamental principal of comity between federal courts and state governments that is essential to "Our Federalism," particularly in the area of state taxation." 102 S. Ct. at 179.

Fourth Circuit:

Fralin and Waldron, Inc. v. Martinsville, Virginia, 493 F. 2d 482 (4th Cir. 1974). Plaintiff alleged that city and officials arbitrarily and discriminatorily refused to issue a special use permit and grant subdivision approval. The Court of Appeals upheld district court's exercise of discretion to abstain, saying:

> All of its claims raise legitimate questions involving municipal zoning ordinances, the correct construction of local land use law as to special use permits, and the delineation of the proper scope and exercise of local administrative discretion. Understandably, the courts of Virginia have extensive familiarity and experience with such matters, and we believe that they should have the initial opportunity to pass upon them. A state adjudication may well avoid the necessity of a decision on the federal constitutional question presented as well as avoid needless friction in federal-state relations over the administration of purely state affairs. We conclude that the requisite special circumstances warranting abstention are present here. . . . 493 F. 2d at 482-83.

Fifth Circuit:

Hill v. El Paso, Texas, 437 F. 2d 352 (5th Cir. 1971). Plaintiff alleged that defendants, a municipality, a judge, and neighbor, had continually subjected him to harassment in the form of falsely claiming his junk yard violated the municipality's zoning ordinance. In affirming the District Court's decision to abstain the Court of Appeals said:

> The question of when the doctrine of abstention ought to be invoked is a matter that involves the exercise of discretion, . . . , and must be approached on a case by case rather than any general principle basis,

> . . . . The fact setting in the case at bar involves the routine application of zoning regulations. This is distinctly a feature of local government. We have recognized that these grass roots procedures are outside the general supervisory power of federal courts. (Citations omitted.) 437 F. 2d at 357.

Sixth Circuit:

Forrest Hills Utility Company v. Heath, 539 F. 2d 592 (6th Cir. 1976). Abstention held appropriate where plaintiffs alleged that a municipality and local officials maliciously and unconstitutionally attempted to disrupt plaintiffs' efforts to convey to a locality a sewage treatment plant forming part of a newly constructed subdivision.

Ninth Circuit:

Santa Fe Land Improvement Company v. Chula Vista, 596 F. 2d 838 (9th Cir. 1979). Court abstained where plaintiff alleged that rezoning of its property constituted an unconstitutional taking without just compensation. See also, *Sederquist v. Tiburon*, 590 F. 2d 278 (9th Cir. 1978).

This general view that abstention is appropriate in cases of this type is also reflected in decisions of United States District Courts. *Beck v. California*, 479 F. Supp. 392 (C. D. Cal. 1979); *Besig v. Friend*, 463 F. Supp. 1053 (N. D. Cal. 1979); *Webber v. Skoko*, 432 F. Supp. 810 (D. Or. 1977); *Stallworth v. Monroeville*, 426 F. Supp. 236 (S. D. Ala. 1976); *Dells, Inc. v. Mundt*, 400 F. Supp. 1293 (S. D. N. Y. 1975); *Resources for Human Development, Inc. v. Furber*, 387 F. Supp. 11 (E. D. Pa. 1975); *Salvati v. Dale*, 364 F. Supp. 691 (W. D. Pa. 1973).

So many federal courts have abstained from cases involving allegations of constitutional violations consisting of allegedly arbitrary and discriminatory administration of land use regulations that one commentator has been prompted to say that, "[d]espite frequent judicial declarations that '[a]bstention from the exercise of federal jurisdictions is the exception, not the rule,' *recent federal cases suggest that abstention in land use cases may in fact have become the rule.*" Land Use Regulation, The Federal Courts and the Abstention Doctrine, 89 Yale L. J. 1134, 1142 (1980) (Emphasis added).

The Court of Appeals simply did not deal with the cases decided by its fellow courts. They referred only to cases where "lower federal courts" have abstained in the land use area. See opinion at A9.

It did attempt to distinguish one particularly analogous case decidedly the United States District Court for the District of Maryland, *Kent Island Joint Venture v. Smith,* 452 F. Supp. 455 (1978), on the ground that in the instant case, unlike in *Kent Island,* the allegations of the complaint were that "local government officials fraudulently acted under color of law for their own personal gain, to thwart those who would compete with their private business ventures" and that defendants engaged in "corrupt tactics." Even assuming this distinction was in fact apparent from the face of the complaint, to recognize it as a legitimate distinction is only to impel prospective plaintiffs to include in their complaints exaggerated accounts—still well within the bounds of legitimate pleading—of the "conspiratorial," or "corrupt" nature of the land use decisions they object to and to include assertions as to the evil motivations of the local governmental officials.

Respectfully submitted,

FRANKLIN POUL
BRIAN P. FLAHERTY
STEPHEN L. HARRIS
EDWARD J. MARCANTONIO
Attorneys for Appellees

Of Counsel:

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor, Packard Building
Philadelphia, Pennsylvania 19102
(215) 977-2000

HARRIS & HARRIS
P. O. Box 160
Warrington, Pennsylvania 18976

SWARTZ, CAMPBELL & DETWEILER
1724-30 PNB Building
Philadelphia, Pennsylvania 19107

Appendix

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1234

HERITAGE FARMS, INC.,
HERITAGE FARM PARTNERSHIP, CONCEPT
PLUS, INC., AND MICHAEL G. LAMELZA,
Appellants

v.

SOLEBURY TOWNSHIP, SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, J. WALTER LIVEZEY JR., FRANK J. SORIERO, JR., PATRICIA D. KNIGHT, INDIVIDUALLY AND IN THEIR RESPECTIVE OFFICIAL CAPACITIES AS MEMBERS OF THE SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, CARL L. LINDSAY, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SOLICITOR OF SOLEBURY TOWNSHIP, AND WILLIAM E. MOON,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 80-2888)

Argued: November 19, 1981
Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges,*
and MEANOR, *District Judge.*[*]
(Filed February 10, 1982)

---

[*] Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

STEVEN L. FRIEDMAN (argued)
LOUIS B. KUPPERMAN
THOMAS J. ELLIOTT
2600 The Fidelity Building
Philadelphia, PA 19109
Attorneys for Appellants

FRANKLIN POUL (argued)
BRIAN P. FLAHERTY
STEPHEN B. HARRIS
EDWARD J. MARCANTONIO
12th Floor, Packard Building
Philadelphia, PA 19102
Attorneys for Appellees

Opinion of the Court

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

I.

In this case, we are asked to examine the doctrine of abstention in a rather novel factual setting. For the reasons set forth below, we hold that the district court's decision to abstain was error and therefore the judgment of the district court must be reversed.

The appellants, plaintiffs below, are in the business of purchasing land and developing it into residential housing units in Solebury Township, Bucks County, Pennsylvania. The defendants include Solebury Township, its Board of Supervisors, past and present members of the Board, and the Township Solicitor. The plaintiffs brought suit on June 23, 1980 seeking declaratory and injunctive relief as well as damages for alleged violations of their constitutional rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976).[1] Because a dismissal (without retention of jurisdiction) on abstention grounds is in the nature of a dismissal under Fed. R. Civ. P. 12(b)(6), *Insurance Federation of Pennsylvania, Inc. v. Supreme Court of Pennsylvania,* No. 80-1769, Typescript Op. at 3 (3d Cir. Jan. 4, 1982), for purposes of this appeal we must accept as true the allegations contained in the plaintiffs' complaint.

The complaint alleges that the various defendants conspired to use their offices to cripple and destroy the plaintiffs' business. Their course of conduct, spanning almost three years, was aimed at preventing the plaintiffs from carrying out plans for various residential developments. The attack was waged on various fronts. The defendants unlawfully denied the necessary governmental approval for certain development projects. Building permits were denied despite the knowledge that the denial of the permits was unlawful under Township ordinances. Escrow monies were not released for work completed. Certificates of occupancy were refused for completed and approved developments. The complaint alleges with great specificity a number of "illegal, arbitrary, unreasonable, confiscatory, [and] discriminatory" acts on the part of the defendants "to frustrate, hinder, obstruct, delay and prevent development of plaintiffs' properties solely for the purpose of inflicting economic harm upon plaintiffs under the color of law." Plaintiffs' Complaint, ¶ 38, 39(i). Individual defendants articulated a personal dislike for plaintiff Lamelza and stated their intent to "bankrupt" him and "put him out of business." In addition, defendant Boas attempted to block one of plaintiffs' commercial ventures in order to prevent competition with his own nearby retail store. As both a member of the Board of Supervisors and Police Commissioner, Boas ordered illegal, repetitive and harassing inspections of the plaintiffs' projects. Various defendants intentionally made false statements to financial institutions in an attempt to persuade them not to finance plaintiffs' projects. In addition to ruining the plaintiffs' credit rating, defendants mounted an adverse publicity campaign against plaintiffs using false and defamatory statements to curtail the plaintiffs' ability to sell their homes. As a result of the defendants' efforts, the plaintiffs suffered severe financial losses as projects were delayed and aborted. In addition, the plaintiffs have suffered injury to their reputation in the business and financial worlds, as well as in the eyes of the community as a whole.

---

[1] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The plaintiffs also made claims based upon the Pennsylvania Constitution and various unspecified laws of the State of Pennsylvania.

All parties agree that the complaint states on its face a claim under § 1983, and that the district court had jurisdiction over the case. Nevertheless, the defendants asked the district court to abstain and dismiss the complaint. The district court granted the motion, relying upon the doctrines articulated in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The plaintiffs appealed. We must consider whether it was error for the district court to have abstained where there does not exist an unsettled question of state law and where important state policies are not threatened by a decision by a federal court.

II.

Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or state agency will have the opportunity to decide the matters at issue. The doctrine was born out of a concern for the maintenance of our federal system; seeking to avoid unnecessary conflicts between the federal judiciary and state government. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500-501 (1941). However, the Supreme Court has recognized that abstention is an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). Consistent with its perception of abstention as the exception rather than the rule, the Supreme Court has recognized only three situations in which abstention is appropriate. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976).

One of the three basic types of abstention has its roots in *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* doctrine requires a district court to abstain where, absent bad faith, harassment, or a patently invalid state statute, the moving party is attempting to enjoin pending state criminal proceedings. 401 U.S. at 54. *Younger* abstention has also been held to be appropriate in certain narrow quasi-criminal or non-criminal settings. *See Huffman v. Pursue*, 420 U.S. 592 (1975) (nuisance); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (state attempt to recover fraudulently obtained welfare benefits); *Moore v. Sims,* 442 U.S. 415 (1979) (state seeking custody of children).

The second type of abstention, *Pullman* abstention, may be invoked where there is an unsettled question of state law, the resolution of which would affect the decision of a federal constitutional issue, either by obviating the need to decide it or by changing the light in which it must be viewed. *See Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 501 (1941).

The final category — *Burford* abstention — derives its name from *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). *Burford* abstention is appropriate where a difficult question of state law is presented which involves important state policies or administrative concerns. 319 U.S. at 332-34. In this situation, a federal court may abstain to avoid disrupting the efforts of a state "to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 814 (1976).

III.

The district court did not rely upon *Younger* abstention, and it clearly has no applicability to this case. The plaintiffs are not attempting to enjoin a pending state proceeding, either criminal or quasi-criminal, nor is there a pending state proceeding involving the precise claims or issues before us in this case.[2]

---

[2] There was a suit pending in the Bucks County Court of Common Pleas in which the appellee Township sued plaintiffs Lamelza and Heritage Farm Partnership as well as others not parties here. However, the issues there involved the completion of one of plaintiffs' projects and are substantially unrelated to the issues in this case. Additionally, plaintiffs' suit in federal court was not an attempt to enjoin these state court proceedings.

A.

The district court did, however, find *Pullman* abstention applicable to the present case, explaining: "this dispute can be disposed of by a state court applying state law, thus avoiding a determination by this court of federal constitutional issues." *Heritage Farms, Inc. v. Solebury Township,* 504 F.Supp. 33, 35 (E.D. Pa. 1980). Although the district court's observation tracked part of the *Pullman* test, the mere presence of a "potentially dispositive question of state law," 504 F.Supp. at 35, has *never* been a sufficient basis *in itself* for declining federal jurisdiction under *Pullman.* The doctrine requires that the question of state law be unsettled. *See, e.g., Reetz v. Bozanich,* 397 U.S. 82, 86 (1970); *Hill v. City of El Paso,* 437 F.2d 352, 356 (5th Cir. 1971).

Neither the district court nor the defendants have pointed to the unsettled question or questions of state law presented by this case. As far as we can discern, there are none. Of course, state law will be involved in this suit, but *Pullman* abstention is certainly not designed to prevent a federal court from applying state law altogether. As one commentator observed: "Federal and state courts are equally capable of applying *settled* state law to a difficult set of facts." *Note, Land Use Regulation, the Federal Courts and the Abstention Doctrine,* 89 Yale L.J. 1134, 1143 n.55 (1980) (emphasis added). In *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), the Supreme Court found *Pullman* abstention inapplicable in part because "[w]hile state claims are involved in the case, the state law appears to be settled." 424 U.S. at 815. To the extent that state law is involved in this case — for example, the law governing land use — it is settled state law, and, as such, *Pullman* abstention is inappropriate.

B.

The district court also found *Burford* abstention applicable, pointing to the "traditionally local nature of land use decisions and the danger of unwarranted federal interference with such traditionally local functions." *Heritage Farms, Inc. v. Solebury Township,* 507 F.Supp. 33, 35-36 (E.D. Pa. 1980). To resolve this issue, we must look to the regulation of land use in Pennsylvania.

In 1968, Pennsylvania enacted the Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53 § 10101 et seq. (Purdon's 1972). This Code embodies Pennsylvania's policies and general rules concerning municipal land development, delegating power to the municipalities to create planning commissions like the Solebury Township Board of Supervisors. These planning commissions direct land development and aid the governing body of the municipality in enacting ordinances, consistent with the provisions of the Code, covering zoning, building and housing codes and the like. *See* Pa. Stat Ann. tit. 53 §§ 10201, 10209.1. Thus, there is no uniform state policy for land use and development — policies necessarily differ from municipality to municipality.

The Pennsylvania Municipalities Planning Code does not involve the type of uniform and elaborate statewide regulation as was adopted by the State of Texas to govern the drilling of oil wells in *Burford.* Furthermore, there is no danger that a federal court decision in this case will disrupt Pennsylvania's policies or plans with respect to land use. Here, as in *Colorado River Water Conservation,* "no questions bearing on state policy are presented for decision. Nor will decision of the state claims impair efforts to implement state policy as in *Burford.*" 424 U.S. at 816. The policies embodied in the Municipalities Planning Code are not being attacked —

it is rather the application of those policies by a single township that is at issue. In fact, if it is found that the defendants acted unlawfully, the state and local policies will be vindicated.

Perhaps most importantly, this case is not simply a land use case. Rather the plaintiffs have alleged that members of the Board have used their governmental offices to further an illegal conspiracy to destroy plaintiffs' constitutional rights to conduct a legitimate business. The Pennsylvania Municipalities Planning Code simply does not address such behavior. Nor do we think that defamation and attempting to persuade financial institutions not to lend to the appellants are simple matters of land use and development policy. In short, *Burford* abstention has no place in this case.

It should be noted that none of the major cases relied upon by defendants involve allegations of pervasive corruption and fraud. The high level of malevolent conduct in this case is quite different than the issue in *Pullman* as to whether a "sleeping car shall be operated . . . [with a] Pullman conductor," *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 497 (1941). Similarly, defendants' illicit conduct is quite different than the gravamen of the complaint in *Burford*, involving a "general regulatory system devised for the conservation of oil and gas in Texas, an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'" *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

There have been cases where lower federal courts have abstained on etiher *Pullman* or *Burford* grounds, or both, when faced with a case involving land use issues. *See generally, Note, Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 Yale L. J. 1134 (1980). The district court relied upon one such case, *Kent Island Joint Venture v. Smith*, 452 F.Supp. 455

(D.Md. 1978). In *Kent Island* a real estate developer alleged a conspiracy on the part of state and local officials to delay and destroy his development plans and asserted that the actions violated his constitutional rights. 452 F.Supp. at 456. However, *Kent Island* is readily distinguishable from the case before us. In *Kent Island,* the only acts at issue were governmental decisions on land use matters. There were no allegations, as there are here, that local government officials fraudulently acted under color of law for their own personal gain, to thwart those who would compete with their private business ventures. Nor did the defendants in *Kent Island* engage in the type of corrupt tactics of which plaintiffs accuse defendants.

We express no view on whether *Kent Island* is correctly decided although we agree with the comment that a district court is not a "state-wide Board of Zoning Appeals," see *Kent Island,* 452 F.Supp. at 464. However, the egregious conduct here — "coconspirators" using their public offices to prevent competition with their private business — makes *Kent Island* easily distinguishable on its facts. It is incumbent upon district courts, faced with a claim arising out of land use questions, to examine the facts carefully to determine what the essence of the claim is. If it is an unlawful conspiracy like the one alleged here, the mere presence of land use issues should not trigger a mechanical decision to abstain.

Since we conclude that abstention in this case is an abuse of discretion,[3] the judgment of the district court will be reversed and the matter will be remanded for further proceedings consistent with this opinion.

---

[3] All parties agree that the standard of review is "whether the District Court abused its discretion in abstaining . . . ." Brief for Appellants at 3; Brief for Appellees at iv.

OPINION AND ORDER OF THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 80-2888

HERITAGE FARMS, INC., HERITAGE FARM PARTNERSHIP, CONCEPTS PLUS, INC., and MICHAEL G. LAMELZA

v.

SOLEBURY TOWNSHIP, SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, J. WALTER LIVEZEY, JR., FRANK J. SORIERO, JR., FRANK C. BOAS, CYRUS R. HOAGLAND and PATRICIA D. KNIGHT, Individually and in their respective official capacities as members of the SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, CARL L. LINDSAY, JR., Individually and in his official capacity as Solicitor of SOLEBURY TOWNSHIP, and WILLIAM E. MOON

Memorandum Opinion and Order

WEINER, *J.* DECEMBER 19, 1980

This is an action alleging violations of plaintiffs constitutional rights, brought pursuant to 42 U.S.C. § 1983, seeking damages, as well as injunctive and declaratory relief. The complaint also alleges violations of the Pennsylvania Constitution and unspecified Pennsylvania laws. Plaintiffs are the owners and developers of several multiunit residential developments located within Solebury Township, Bucks County, Pennsylvania. Defendants are Solebury Township (Township), the Solebury Township Board of Supervisors (Board), the members of the Board and the Township's Solicitor, named in their official and individual capacities, and a former member of the Board, named in his individual capacity.

Presently before the court is the defendants' motion to dismiss on the ground of abstention, or in the alternative, to dismiss the claims for damages against the individual defendants. For the reasons to follow, the defendants' motion to dismiss on the ground of abstention is granted.

Plaintiffs allege that the defendants have engaged and continue to engage in a course of conduct and conspiracy intended to impede, obstruct, delay and destroy plaintiffs current and future development projects. The alleged unlawful conduct and conspiracy of the defendants includes the following:

(1) continuing unlawful refusals to grant approvals of plaintiffs' development projects routinely required by law;

(2) imposition of unlawful conditions on plaintiffs' projects, including unlawful refusals to release escrow monies in order to bankrupt plaintiffs, unlawful refusal to accept required dedication of completed public roads, unlawful refusals to issue certificates of occupancy for Ingham Mews — an otherwise completed fully approved residential development;

(3) unlawful opposition to plaintiffs' Logan Square commercial development orchestrated by defendant Frank C. Boas, who owns and operates a commercial store nearby that would have to compete with proposed shops in Logan Square;

(4) unlawful bans on issuance of building permits;

(5) declarations of intent by defendants to bankrupt plaintiff Michael G. Lamelza;

(6) efforts to dissuade financial institutions from financing plaintiffs' development projects;

(7) ongoing defamation and vilification of plaintiffs in order to further damage plaintiffs;

(8) repeated harassing inspections and reviews of plaintiffs projects.

The complaint alleges that defendants' conduct: (1) has violated "rights, privileges, and immunities secured by the Constitution of the United States, including plaintiffs' rights to notice and opportunity for hearing and equal protection of the laws secured by the Fourteenth Amendment, and 42 U.S.C. § 1983;" (2) constitutes a "taking of plaintiffs' property without due process of law" in violation of the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983; (3) has denied plaintiffs "the equal protection of state and local laws" by denying necessary approvals and imposing oppressive and confiscatory conditions and restrictions on their business operations and project, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. The complaint also alleges that plaintiffs "have not and will not be able to obtain fair and impartial treatment from the Board of Supervisors . . . in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

The complaint further alleges that the defendants (1) have interfered with the plaintiffs' use and enjoyment of their property in violation of the Constitution of the Commonwealth of Pennsylvania; (2) have unlawfully and tortiously interfered with the plaintiffs' "existing relationships in violation of the laws of the Commonwealth of Pennsylvania;" (3) have unlawfully defrauded and attempted to defraud the plantiffs of their property, in violation of the laws of the Commonwealth of Pennsylvania; and (4) have unlawfully extorted and attempted to extort property and money from them in violation of the laws of the Commonwealth of Pennsylvania.

Under the doctrine of abstention, a federal court may decline to exercise or postpone the exercise of its jurisdiction in certain exceptional circumstances where repair to the state court would clearly serve an important countervailing interest to the obligations of a district court to adjudicate cases properly before it. *Colorado River Water Conversation District v. United States,* 424 U.S. 800, 813-817 (1976). In that case, the Supreme Court articulated the three types of abstention applicable to the federal courts.

The first of these three types of abstention stems from *Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941). Under the *Pullman* doctrine, a federal court should abstain in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.

The second type of abstention arises out of *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). *Burford* type abstention is appropriate where exercise of federal review of difficult state law questions would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

The third type of abstention is based upon *Younger v. Harris,* 401 U.S. 37 (1971). Abstention is appropriate under *Younger* where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.

Cases involving questions of land use policy have consistently been considered especially appropriate for abstention because of the distinctly local nature of land use regulation and the special sensitivity which surround land use issues. *See, Kent Island Joint Venture* v. *Smith*, 452 F.Supp. 455, 462 (D. Md. 1978), and cases cited therein. Justification for abstention in land use cases is based upon the principles of both *Pullman* and *Burford Id.* State courts are more accustomed to reviewing local land use decisions, and federal adjudication of land use disputes would cause needless conflict with state and local administration of concerns with which state courts have more familiarity and expertise. *Id.*

Despite plaintiffs' desire to characterize the defendants' actions as a conspiracy to deprive them of constitutional rights, this action is in essence a local land use dispute, which is more appropriately adjudicated in a state rather than a federal court.

Pullman-type abstention is appropriate here because this dispute can be disposed of by a state court applying state law, thus avoiding a determination by this court of federal constitutional questions. *See, Lewellyn v. Gerhardt*, 513 F.2d 184 (7th Cir. 1975). Indeed, as was stated in that case, "[t]he case before us appears to be a classic *Pullman*-type abstention case because there is presented in addition to the alleged federal claim an unsettled issue of state law which is capable of superseding altogether the federal question." *Id.* at 187. (footnote omitted). In addition to their federal constitutional claims, plaintiffs here have asserted claims based upon the Constitution and laws of the Commonwealth of Pennsylvania. Those state claims arise from the same alleged conduct of defendants and seek the same relief as do their federal constitutional claims. A state court hearing those state claims might well dispose of this matter without the need to address federal constitutional issues. *Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 493 F.2d 481 (4th Cir. 1974) (Opinion by Mr. Justice Tom Clark). Since there is a potentially dispositive question of state law, abstention is warranted in this case. *See, Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F.2d 838 (9th Cir. 1979).

Burford-type abstention is also appropriate because of the traditionally local nature of land use decisions and the danger of unwarranted federal interference with such traditionally local functions. *See, Kent Island Joint Venture v. Smith,* 452 F.2d at 463. A state adjudication here may well avoid needless friction in federal state relations over the administration of purely state affairs. *Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 493 F.2d at 482-83.

We find support for our conclusion in the case of *Kent Island Joint Venture v. Smith,* 452 F.Supp. 455 (D. Md. 1978), in which the court was faced with similar federal constitutional claims based on the defendant state and local officials' alleged conspiracy to prevent the development of the plaintiffs' property. The court there reasoned that abstention was warranted on both *Pullman* and *Burford* grounds.

Abstention is not precluded here merely because the plaintiffs bring this suit as a civil rights action. *Lewellyn v. Gerhardt,* 513 F.2d at 187; *Nelson v. Septa,* 420 F. Supp. 1374, 1381 (E.D. Pa. 1976). We note, however, that in regard to civil rights cases, a court must exercise extreme care, and proceed on a case by case basis, when ruling on a motion to dismiss on grounds of abstention. Such diligence is necessary in order to preserve the availability of a federal forum for vindication of federal constitutional rights deprivations. *See, Harris County Commissioners Court v. Moore,* 420 U.S. 77, 83 (1975). Blanket application of the doctrine of abstention in land use cases would forclose the option of pursuing land-use related federal constitutional claims in federal court. Such a policy would subvert the purpose of civil rights statutes such as 42 U.S.C. § 1983 and erode the guarantees of the United States Constitution. *Cf., Id.* at 89, 90 (Douglas, J., dissenting); *Harrison v. N.A.A.C.P.,* 360 U.S. 167, 184 (1959). (Douglas, J., dissenting) (federal constitutional challenges to non-land use state statutes). *See generally, Note, Land Use Regulation, the Federal Courts, and the Abstention Doctrine,* 89 Yale L.J. 1134 (1980).

We have given due consideration to those concerns, and conclude that in the context of the case *sub judice,* the federalist values behind the doctrine of abstention outweigh competing values presented by the duty of the federal judiciary to hear cases properly before it and the need to prevent impairment of federal constitutional guarantees and assure access to the federal courts by those seeking redress of alleged violations of those constitutional guarantees. *McKnight v. SEPTA,* 583 F.2d 1229, 1241 (3d Cir. 1978).

We shall therefore exercise our discretion to dismiss this case, without prejudice. *McKnight v. SEPTA,* 438 F. Supp. 813, 828 (E.D. Pa. 1977); *vacated and remanded,* 583 F.2d 1229 (3d Cir. 1978); *Nelson v. SEPTA,* 420 F.Supp. at 1381. At the conclusion of state proceedings, of course, plaintiffs may return to the federal courts for a disposition on the merits of their federal claims should the state courts hold against them on the questions of local law. *American Trial Laywers Assn. v. New Jersey Supreme Court,* 409 U.S. 467, 469 (1973); *Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 493 F.2d at 483.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 80-2888

HERITAGE FARMS, INC., HERITAGE FARM PARTNERSHIP, CONCEPTS PLUS, INC., and MICHAEL G. LAMELZA

v.

SOLEBURY TOWNSHIP, SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, J. WALTER LIVEZEY, JR., FRANK J. SORIERO, JR., FRANK C. BOAS, CYRUS R. HOAGLAND and PATRICIA D. KNIGHT, Individually and in their respective official capacities as members of the SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, CARL L. LINDSAY, JR., Individually and in his official capacity as Solicitor of SOLEBURY TOWNSHIP, and WILLIAM E. MOON

Order

DECEMBER 19, 1980

The defendants' motion to dismiss on the grounds of abstention is GRANTED. This case is dismissed, without prejudice, with leave to reinstate upon final adjudication by a state court of state law questions.

IT IS SO ORDERED.

ENTERED: 12/22/80
CLERK OF COURT

/s/ CHARLES R. WEINER
Charles R. Weiner

JUDGMENT ORDER SOUGHT TO BE REVIEWED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1234

HERITAGE FARMS, INC.,
HERITAGE FARM PARTNERSHIP,
CONCEPTS PLUS, INC., and
LAMELZA, MICHAEL G.,

Appellants,

v.

SOLEBURY TOWNSHIP,
SOLEBURY TOWNSHIP BOARD OF SUPERVISORS,
LIVEZEY, J. WALTER, JR.,
SORIERO, FRANK J., JR.
BOAS, FRANK C., HOAGLAND, CYRUS R.,
and KNIGHT, PATRICIA D.,
Individually and in their respective
official capacities as members of the
SOLEBURY TOWNSHIP BOARD OF SUPERVISORS,
LINDSAY, CARL L., JR., Individually
and in his official capacity as
Solicitor of SOLEBURY TOWNSHIP, and
MOON, WILLIAM E.

(D. C. Civil No. 80-2888)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Gibbons and Higginbotham, *Circuit Judges*; and Meanor,* *District Judge*.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on November 19, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 22, 1980, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ Sally Mrvos
Clerk

February 10, 1982

---

* Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-2888

HERITAGE FARMS, INC., HERITAGE FARM PARTNERSHIP, CONCEPTS PLUS, INC., and MICHAEL G. LAMELZA,

Plaintiffs

v.

SOLEBURY TOWNSHIP, SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, J. WALTER LIVEZEY, JR., FRANK J. SORIERO, JR., FRANK C. BOAS, CYRUS R. HOAGLAND and PATRICIA D. KNIGHT, Individually and in their respective official capacities as members of the SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, CARL L. LINDSAY, JR., Individually and in his official capacity as Solicitor of SOLEBURY TOWNSHIP, and WILLIAM E. MOON,

Defendants

JURY TRIAL DEMANDED

COMPLAINT

I. JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202 and under the doctrine of pendent jurisdiction. The amount in controversy is in excess of $50,000, exclusive of interest and costs.

2. Plaintiffs have no adequate remedy at law and have suffered and will continue to suffer, immediate and irreparable harm from the actions taken by defendants. Accordingly, plaintiffs seek injunctive relief. Plaintiffs have also suffered and will continue to suffer damages in excess of $50,000 from the actions taken by defendants and further seek declaratory relief.

3. Since the claims set forth herein arose in the Eastern District of Pennsylvania and all defendants reside in the Eastern District of Pennsylvania, venue is proper pursuant to 28 U.S.C. § 1391(b).

II. Parties

4. Plaintiff, Heritage Farms, Inc. ("Heritage"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Doylestown, Pennsylvania. Heritage is the owner and developer of "Ingham Mews", a 64 unit, 6.5 million dollar condominium development located within the Township.

5. Plaintiff, Heritage Farm Partnership ("Heritage Partnership"), is a limited partnership organized and existing under the laws of the Commonwealth of Pennsylvania. Heritage Partnership was the original owner and developer of "Limeport-Section I" ("Limeport"), a 32 unit, multi-million dollar residential development located within the Township.

6. Plaintiff, Concepts Plus, Inc. ("Concepts"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Doylestown, Pennsylvania. Concepts is the owner and developer of "Hidden Valley", a 24 unit, multi-million dollar residential subdivision, and "Logan Square", a 12 million dollar shopping center development, and was the equitable owner and intended developer of "Laurel

Hill", a 25 unit, multi-million dollar residential subdivision, all located within the Township.

7. Plaintiff, Michael G. Lamelza ("Lamelza") is an individual residing in Solebury Township, Pennsylvania and is the president, chief executive officer, principal shareholder and founder of Heritage and Concepts, and is the general partner of Heritage Partnership. Lamelza was the original owner and developer of "Red Fox Farms", a 20 unit, multi-million dollar residential subdivision located within the Township.

8. Defendant, Solebury Township ("Township"), Bucks County, Pennsylvania, is a municipality organized and existing as a township of the second class pursuant to Article II of the Pennsylvania Second Class Township Code, 53 P.S. § 65201, *et seq*.

9. Defendant, Solebury Township Board of Supervisors ("Board of Supervisors"), is the executive body responsible for supervising, governing and conducting the affairs of the Township, pursuant to Article V of the Pennsylvania Second Class Township Code, as amended, 53 P.S. § 65510.

10. Defendant, J. Walter Livezey, Jr., is a member of the Board of Supervisors and resides in Carversville, Pennsylvania, and is a defendant in his official and individual capacities.

11. Defendant, Frank J. Soriero, Jr., is a member of the Board of Supervisors and resides in Solebury Township, Pennsylvania, and is a defendant in his official and individual capacities.

12. Defendant, Frank G. Boas, is a member of the Board of Supervisors and resides in Solebury Township, Pennsylvania, and is a defendant in his official and individual capacities.

13. Defendant, Cyrus R. Hoagland, is a member of the Board of Supervisors and resides in Solebury Township, Pennsylvania, and is a defendant in his official and individual capacities.

14. Defendant, Patricia D. Knight, is a member of the Board of Supervisors and resides in Solebury Township, Pennsylvania, and is a defendant in her official and individual capacities.

15. Defendant, Carl L. Lindsay, Jr., is the Solicitor for the Township and resides in Solebury Township, Pennsylvania, and is a defendant in his official and individual capacities.

16. Defendant, William E. Moon is a former member of the Board of Supervisors and resides in Solebury Township, Pennsylvania and is a defendant in his individual capacity.

III. STATEMENT OF FACTS

17. Defendants Livezey, Soriero, Boas, Hogland and Knight comprise the present Board of Supervisors of the Township.

18. From about 1977 to 1979, the Board of Supervisors was comprised of defendants Livezey, Hoagland and Moon.

19. At all times material hereto, defendant Lindsay has been and is the Solicitor for the Township.

20. Pursuant to Articles V and VI of the Pennsylvania Municipalities Planning Code ("Planning Code"), 53 P.S. § 10501, *et seq.*, the Board of Supervisors is the executive body within the Township which is empowered to promulgate ordinances governing zoning, land development and subdivisions, and to review, regulate, control, supervise and approve all land developments and subdivisions within the Township.

21. Plaintiffs' business and livelihood derives from the ownership and development of real property.

22. Pursuant to Section 508 of the Planning Code, 53 P.S. § 10508, proposed land developments and subdivisions which conform to applicable Township ordinances must be approved by the Board of Supervisors without the imposition of unauthorized, unreasonable, uneconomic, and undisclosed conditions.

23. The Township, by its Board of Supervisors, has adopted an illegal policy of restricting, delaying, hindering and frustrating lawful land development and subdivision within its political boundaries in an attempt to prevent, deny and obstruct meaningful, necessary and required growth, notwithstanding the mandate of law.

24. Beginning in or about 1977, the former Board of Supervisors (defendants Livezey, Hoagland and Moon) embarked on a pattern and course of conduct designed and intended to frustrate, delay, hinder, obstruct and prevent developments proposed and/or begun by plaintiffs, and to destroy the economic existence of and to bankrupt the plaintiffs, which pattern and course of conduct have been ratified, adopted, confirmed and continued to the present by the present Board of Supervisors (defendants Livezey, Soriero, Boas, Hoagland and Knight), as is more fully alleged and set forth hereinafter.

25. In or about 1976, Heritage Partnership subdivided and began development in connection with its Limeport project within the Township.

26. As a condition of approval for the Limeport subdivision, which had been granted by a predecessor Board of Supervisors of 1976, an escrow fund was created fully securing the costs of construction, *inter alia*, of the roadway system within the subdivision.

27. In 1977, pursuant to its plan of development, and after completion of appropriate portions of the roadway system, Heritage Partnership sold most of its improved building lots within Limeport to William E. Worthington, Inc. ("Worthington"), for the construction by Worthington of individual family residences upon such lots.

28. In or about November of 1977, defendants Hoagland and Moon, comprising the majority of the then three-man Board of Supervisors, illegally imposed a ban on the issuance of building permits for Limeport, thereby unlawfully preventing further development and construction within the subdivision.

29. Although defendants Hoagland and Moon were aware, on the advice and recommendation of counsel, that the aforesaid ban was illegal and contrary to law, they nevertheless willfully, purposefully and maliciously instituted such ban, to prevent, obstruct, hinder, frustrate and delay the lawful development of the project.

30. In addition, defendants Hoagland, Moon, and Lindsay unlawfully, willfully and maliciously denied Heritage Partnership the proper, required and necessary releases of funds from escrow to pay for the roadway construction work completed at that time, thereby preventing further roadway improvements within Limeport, and causing the construction contractors performing such work to refuse further performance on their contracts.

31. During this period of time, defendant Moon stated and avowed that he "did not like Worthington and Lamelza" and that he would "bankrupt" them and "put them out of business." Defendant Moon further avowed that he would never again "approve" a "Lamelza project" and that Limeport would never be "completed."

32. As a direct and immediate result of the illegal ban on building permits and the unlawful intentions and action of defendants Moon and Hoagland, construction was halted at Limeport which resulted in the bankruptcy and economic destruction of Worthington.

33. As a further direct and immediate result of the unlawful conduct, actions and intentions of defendants Moon and Hoagland, the then proposed Hidden Valley subdivision to be developed by plaintiff Concepts was unlawfully and maliciously rejected and disapproved by defendants Moon and Hoagland in or about November of 1977.

34. As a result of this unlawful, willful, malicious and punitive rejection and disapproval, Concepts was forced and required to institute time consuming and costly litigation which further delayed, hindered, frustrated and obstructed its lawfully proposed development.

35. The present Board of Supervisors, comprised of defendants Livezey, Soriero, Boas, Hoagland and Knight, and defendant Lindsay, in furtherance of this pattern and course of unlawful conduct, have taken the following illegal actions, both individually and in combination and conspiracy.

(a) on or about June 3, 1980, defendants Boas, Hoagland and Knight unlawfully, maliciously, willfully and punitively issued a moratorium and ban on issuance of certificates of occupancy for the Ingham Mews project without notice and an opportunity for Heritage to be heard;

(b) in addition, defendants Boas, Hoagland and Knight have unlawfully, willfully, maliciously and punitively refused to authorize releases from the Ingham Mews escrow fund although all public improvements have been completed and finished within the project;

(c) further, defendants Boas, Hoagland, Soriero and Knight have unlawfully, maliciously, punitively and willfully refused to accept the required dedication of the roadway system within Ingham Mews and have attempted to impose additional, illegal and unauthorized conditions precedent to such dedication; and

(d) defendants Boas, Hoagland, Soriero and Knight have been and are aware, upon the advice and recommendation of counsel, that the aforesaid actions are illegal, contrary to authority, unjustified and unwarranted.

36. Defendant Lindsay, acting individually and in combination and conspiracy with the remaining defendants, has frustrated, obstructed, and prevented the Laurel Hill proposed subdivision from being approved and started by willfully, maliciously and purposefully imposing illegal additional conditions of approval upon the plans and delaying transmission and execution of required approval documents beyond the stated commitment dates for financing secured by plaintiff Concepts which resulted in the loss of such commitments and subsequent default by Concepts on its agreement of sale for the property.

37. During the summer and fall of 1979, defendant Boas, who was not then a member of the Board of Supervisors, appeared before the Board of Supervisors, the Township Planning Commission and Zoning Hearing Board and presented spurious, baseless, unwarranted and malicious objections to the Logan Square shopping center being developed by plaintiff Concepts. Throughout this period of time, and continuing to the present, defendant Boas owns and operates a commercial store located in New Hope Borough which is located in close proximity to Logan Square, which may be subjected to unwanted competition from the commercial stores comprising Logan Square.

38. The above-described actions by defendants are illegal, arbitrary, unreasonable, confiscatory, discriminatory, in clear violation of the statutory and case law of the Commonwealth of Pennsylvania, and bear no relationship to the health, safety, convenience and welfare of the community.

39. As a result of the foregoing acts set forth above, defendants and others whose identities are presently unknown, individually and in combination and conspiracy, have denied and deprived plaintiffs of their lawful rights and the beneficial use and enjoyment of their properties. In furtherance of the conspiracy, and in addition to the acts set forth above, defendants have performed the following acts:

(a) defendants Moon and Boas, respectively, have pressured and induced the Board of Supervisors to unlawfully frustrate, hinder, delay, obstruct and prevent plaintiffs from lawfully developing their properties in an attempt to "bankrupt" plaintiffs or otherwise cause them financial harm and economic destruction;

(b) defendant Boas, in furtherance of his corrupt conflict of interest, has stated that he will not approve the dedication of the roadways and release of escrow funds of Ingham Mews until "hell freezes over";

(c) defendants and other co-conspirators whose identities are not presently known, held secret and illegal meetings apart from the regularly scheduled public meetings of the Board of Supervisors;

(d) defendant Lindsay has attempted to interfere with, frustrate, obstruct and disrupt plaintiffs' contractual and business relationship by contacting a primary lending institution of the plaintiffs to disuade participation and funding of plaintiffs' projects by stating that plaintiff

Lamelza was a "crook", and by repeating such defamatory false statements to prospective purchasers of units within Ingham Mews;

(e) in addition, defendant Lindsay has stated that he "didn't like Lamelza", and that the Township was "going to do something about him";

(f) in or about June of 1978, defendant Boas illegally ordered, instructed, and participated in harsh and harassing inspections of Ingham Mews by the police chief and other Township officials in an attempt to frustrate, hinder, obstruct and delay development of such projects;

(g) defendants have repeatedly issued and caused to be issued adverse, false, malicious, and defamatory public statements concerning, *inter alia,* spurious and unfulfilled "investigations" of various of plaintiffs developments which have resulted in hostile and adverse news reports and articles.

(h) defendants have imposed unlawful, arbitrary, unreasonable, punitive and confiscatory conditions upon plaintiffs' development applications, even though they knew or had reason to know, that such conditions were unlawful and imposed in bad faith;

(i) defendants, acting individually and in combination and conspiracy, have undertaken to frustrate, hinder, obstruct, delay and prevent development of plaintiffs' properties solely for the purpose of inflicting economic harm upon plaintiffs under the color of law;

(j) defendants have unlawfully extorted from plaintiffs excessive, unauthorized, confiscatory and punitive fees and charges for approval and permits needed to institute and complete construction;

(k) defendants have willfully, maliciously, punitively and unlawfully taken actions which require plaintiffs to seek judicial intervention and relief in an attempt to further frustrate, hinder, delay and prevent the timely and economic development of plaintiffs' properties;

(l) defendants have imposed unlawful escrow requirements upon plaintiffs in an attempt to economically preclude further development and construction of plaintiffs projects;

(m) defendants Boas and Hoagland, in their respective additional capacities of police commissioner and road master of the Township, have conducted and caused to be conducted harsh, unusual, excessive, repetitive and harassing inspections and reviews of plaintiffs' developments in an attempt to impose unreasonable, confiscatory, and punitive costs upon plaintiffs; and

(n) defendants have required excessive, costly, repetitive and harassing inspections and reviews by the Township's building and plumbing inspectors in an attempt to justify illegal, unusual, confiscatory and punitive conditions upon plaintiffs' building and development plan.

40. Plaintiffs have no adequate remedy at law, and have suffered and will continue to suffer immediate and irreparable harm from the actions taken by defendants unless the Court grants the injunctive and declaratory relief prayed for herein.

41. Plaintiffs have suffered and will continue to suffer immediate and irreparable harm in that:

(a) plaintiffs' commitments for land acquisition and construction financing are in jeopardy and subject to termination;

(b) the foregoing actions of defendants have seriously jeopardized plaintiffs' abilities to meet agreements of sale with purchasers of residential units to be constructed in their projects because of their inability to secure the necessary and required permits and approval from the Township;

(c) plaintiffs have lost, and will continue to lose prospective sales to interested buyers of their residential units by reason of the actions taken by defendants and the resultant hostile and adverse publicity attended thereto;

(d) plaintiffs must delay and/or terminate plans for construction, thereby jeopardizing their multi-million dollar investment with resultant loss of employment and livelihood for the employees of plaintiffs;

(e) plaintiffs have been forced to expend, and will continue to expend additional unwarranted and burdensome amount for engineering and other professional fees to secure permits and approvals unreasonably and unlawfully withheld by defendants;

(f) plaintiffs have suffered, and will continue to suffer, a loss of goodwill among their prospective clients;

(g) plaintiffs have suffered, and will continue to suffer, irreparable injury to their business standing, credit rating, credibility and reputation in the community;

(h) plaintiffs' constitutional and statutory rights and privileges to enjoy the beneficial use of their properties has been abrogated and violated by the actions of defendants;

(i) by virtue of defendants unlawful, malicious, punitive and willful conduct and actions, plaintiff Lamelza is in jeopardy of the imposition of liability for damages, cost overruns and additional financial commitments as a result of litigation instituted by subcontractors working on plaintiffs' projects; and

(j) plaintiffs have suffered and will continue to suffer reduced sales, increased financing and construction charges and delays in construction.

42. Defendants' course of conduct, as set forth above, has deprived plaintiffs of the beneficial use and enjoyment of their properties in violation of the Fifth and Fourteenth amendments to the United States Constitution.

43. As to each item or relief, sought herein, greater injury will be inflicted upon plaintiffs by the denial of such relief, than the impact, if any, upon defendants by the granting of such relief.

IV. STATEMENT OF CLAIMS

Count I

44. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 43 of this Complaint.

45. Defendants' conduct, alleged herein, under color of law, has violated rights, privileges, and immunities secured by the Constitution of the United States, including plaintiffs' rights to notice and opportunity for hearing and equal protection of the laws secured by the Fourteenth Amendment, and 42 U.S.C. § 1983.

Count II

46. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 45 of this Complaint.

47. Defendants' conduct, alleged herein, constitutes a taking of plaintiffs' property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

Count III

48. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 47 of this Complaint.

49. As a result of the actions of defendants alleged herein, plaintiffs have been denied the equal protection of state and local laws by denying them necessary approvals, decisions and actions required by law, and by imposing on plaintiffs' business operations and projects oppressive, repressive, punitive, confiscatory and unlawful conditions and restrictions not otherwise imposed or required in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Count IV

50. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 49 of this Complaint.

51. As a result of the actions of defendants alleged herein, plaintiffs have not and will not be able to obtain fair and impartial treatment, hearings and decisions from the Board of Supervisors, as such Board is composed of, and is controlled by the very defendants named herein who are motivated by personal animus and malice toward plaintiffs in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Count V

52. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 51 of this Complaint.

53. The subject matter jurisdiction of this Court over the claims alleged in Count V is pendent to the federal claims contained in Counts I, II, III and IV of this Complaint.

54. Defendants actions alleged herein have unlawfully interfered with and denied plaintiffs the beneficial use and enjoyment of their properties in violation of the Constitution of the Commonwealth of Pennsylvania.

Count VI

55. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 54 of this Complaint.

56. The subject matter jurisdiction of this Court over the claims alleged in Count VI is pendent to the federal claims contained in Counts I, II, III and IV of this Complaint.

57. Through their actions as alleged herein, defendants have unlawfully and tortiously interfered with plaintiffs' existing and prospective contractual and business relationships in violation of the laws of the Commonwealth of Pennsylvania.

Count VII

58. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 57 of this Complaint.

59. The subject matter jurisdiction of this Court over the claims alleged in Count VII is pendent to the federal claims contained in Counts I, II, III and IV of this Complaint.

60. Defendants have by the aforesaid illegal conduct and conspiracy, unlawfully defrauded and attempted to

defraud plaintiffs of their property, in violation of the laws of the Commonwealth of Pennsylvania.

Count VIII

61. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 60 of this Complaint.

62. The subject matter jurisdiction of this Court over the claims alleged in Count VIII is pendent to the federal claims contained in Counts I, II, III and IV of this Complaint.

63. Defendants have by the aforesaid illegal conduct and conspiracy, unlawfully extorted and attempted to extort property and money from the plaintiffs in violation of the laws of the Commonwealth of Pennsylvania.

Count IX

64. Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through 63 of the Complaint.

65. The subject matter jurisdiction of this Court over the claims alleged in Count IX is pendent to the federal claims contained in Counts I, II, III and IV of this Complaint.

66. Defendants are and have been well aware that their above-described willful, intentional and unlawful conduct has caused, is causing, and will continue to cause substantial, severe, permanent and irreparable harm, damage, loss and injury to plaintiffs, and defendants, nevertheless, have continued this unlawful conduct in wanton and willful disregard of the rights of plaintiffs. Accordingly, plaintiffs are entitled to and hereby claim exemplary and punitive damages.

V. RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

1. Preliminarily and permanently enjoin defendants, their agents and all those acting in concert with them, from unlawfully interfering with, hindering, delaying, frustrating, obstructing, and/or preventing the lawful development and operation by plaintiffs of their properties, projects and businesses;

2. Preliminarily and permanently enjoin defendants, their agents and all those acting in concert with them, from unlawfully imposing conditions, restrictions, obligations, responsibilities or liabilities upon plaintiffs and/or their projects and operations;

3. Declare the Township-required Escrow Agreement for Ingham Mews to be null and void and direct the immediate release and distribution to Heritage of all remaining escrow funds being held in connection with Ingham Mews, without set-off or deduction;

4. Enter judgment in favor of plaintiffs and against defendants jointly and severally on Counts I, II, III, IV, V, VI, VII and VIII of plaintiffs' Complaint in the amount that plaintiffs have been damaged in excess of $5,000,000;

5. Enter judgment in favor of plaintiffs and against defendants jointly and severally on Count IX of plaintiffs Complaint for exemplary and punitive damages in the amount of $10,000,000;

6. Enter judgment for plaintiffs and against defendants jointly and severally for the costs of litigation, including reasonable attorneys' fees;

7. Retain jurisdiction of this action to insure compliance with the judgment of this Court; and,

8. Grant such further relief as the Court deems necessary and proper.

/s/ THOMAS J. ELLIOTT
Steven L. Friedman
Thomas J. Elliott
Louis B. Kupperman
2600 The Fidelity Building
Philadelphia, PA 19109
(215) 546-3000

Attorneys for Plaintiffs

OF COUNSEL

DILWORTH, PAXSON, KALISH
& LEVY

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-2888

HERITAGE FARMS, INC., et al.,
Plaintiff

v.

SOLEBURY TOWNSHIP, et al.,
Defendants

MOTION TO DISMISS ON THE GROUND THAT THE COURT SHOULD ABSTAIN FROM EXERCISING ITS JURISDICTION, OR, IN THE ALTERNATIVE TO DISMISS THE DAMAGE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

Defendants, Solebury Township, et al., by their attorneys, hereby move that the court dismiss this action on the ground that the court should abstain from the exercise of its jurisdiction for the reasons alleged in the memorandum in support thereof. In the alternative, the individual defendants move that the court dismiss the damage claims under 42 U.S.C. § 1983 against them.

/s/ FRANKLIN POUL
Franklin Poul
Edward J. Marcantonio
Brian P. Flaherty

OF COUNSEL:

WOLF, BLOCK, SCHORR and SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pennsylvania 19102
(215) 569-4000

SWARTZ, CAMPBELL & DETWEILER
1724-30 PNB Building
Philadelphia, Pennsylvania 19107
(215) 564-5190

STATE OF PENNSYLVANIA }
COUNTY OF BUCKS } ss

AFFIDAVIT

I, CARL L. LINDSAY, JR., being duly sworn according to law, do depose and say that the following facts are true and correct to the best of my knowledge, information, and belief:

1. I have been the Solicitor of the Township of Solebury, Bucks County, Pennsylvania, ("Solebury") since July, 1959.

2. I have read the Complaint filed in Heritage Farms, Inc., et al. v. Solebury Township, et al., C.A. No. 80-2880. In that complaint, there are allegations made as to several instances in which one or more of the plaintiffs are said to have been deprived of their constitutional rights by one or more of the defendants. The facts with respect to those allegations are as follows:

LIMEPORT I ZONING PERMITS

3. In 1977 there was a dispute as to the issuance of zoning permits to William E. Worthington, Inc. The dispute was resolved by a decision of the Zoning Hearing Board of Solebury of January 26, 1978. A copy of the decision of the Board is appended hereto as Exhibit "A". No appeal was taken from that decision.

LIMEPORT I ESCROW AGREEMENT

4. On June 1, 1976, plaintiff Heritage Farms Partnership, Solebury and Newtown Savings Association entered into an Escrow Agreement pursuant to Section 509 of the Pennsylvania Municipalities Planning Code. That Escrow Agreement is now the subject of a lawsuit proceeding in

the Bucks County Court of Common Pleas, No. 80-5899-12-5. A true and correct copy of the complaint in that action is appended hereto as Exhibit "B".

HIDDEN VALLEY SUBDIVISION PLAN APPROVAL

5. On October 26, 1977 the Solebury Board of Supervisors ("Board") rejected a preliminary plan presented by plaintiff Concepts Plus, Inc. ("Concepts") for the development of a residential subdivision in Solebury which called for the use of a "spray irrigation" sewage disposal system. After the plan was rejected Concepts filed a notice of appeal in the Bucks County Court of Common Pleas. Later it filed a revised preliminary plan which called for the construction of a conventional sewage disposal system. The revised plan was approved by the Board on April 18, 1978 and pursuant to that plan the Hidden Valley subdivision has been completed. On August 14, 1978 Concepts withdrew its Notice of Appeal.

INGHAM MEWS CERTIFICATES OF OCCUPANCY

6. On June 3, 1980 the Board learned that the water had been drained from the swimming pool at the Ingham Mews development. Under the Ingham Mews Subdivision Plan which had been submitted and approved by the Board the water in that pool was to be a source of water in the event of fire. As a result, upon learning about the draining of the pool the Board imposed a moratorium on the granting of additional certificates of occupancy for Ingham Mews. As soon as the pool was refilled the moratorium was lifted. It was in place for only two weeks, from June 3, 1980 to June 17, 1980.

INGHAM MEWS ESCROW FUND

7. On April 6, 1979 the Township, Heritage Farms, Inc. ("Heritage") and Newtown Savings Association

entered into an Escrow Agreement pursuant to Section 509 of the Pennsylvania Municipalities Planning Code. A copy of the Agreement is attached hereto as Exhibit "C". On July 11, 1980, Heritage submitted an amendment to the Escrow Agreement which would modify it to provide that part of the escrow funds could be released now. The Township has not agreed to the modification. A copy of the proposed amendment is attached hereto as Exhibit "D".

INGHAM MEWS DEDICATION OF ROADWAYS

8. On June 25, 1980, Heritage sent a letter to the Board requesting that it accept dedication of the roadways in the Ingham Mews development. A copy of that letter is attached hereto as Exhibit "E". On July 15, 1980, the Board directed that the Solebury Engineer inspect the roadways and report back to it. On August 1, 1980, the Engineer submitted a report to the Supervisors in which he noted several defects in the roadways. A copy of that report is appended hereto as Exhibit "F". On August 5, 1980, the Board voted not to accept dedication and notified Heritage of its decision. On August 27, 1980, the developer again requested by letter that the Board accept dedication, saying that all the items referred to in the Township Engineer's report had been corrected. A copy of that letter is attached hereto as Exhibit "G". On September 2, 1980, the Board again asked the Engineer to inspect the roadways and to submit a report to it.

LAUREL HILL ESCROW AGREEMENT

9. On February 5, 1980, the Board approved the final subdivision plan of Concepts for development of a subdivision known as Laurel Hill, conditional upon the reaching of an agreement pursuant to Section 509 of the Municipalities Planning Code to secure completion of the improvements to be constructed in the Laurel Hill sub-

division. I prepared and submitted to Concepts an escrow agreement and a development agreement in accordance with the condition upon the Board's approval. Concepts and the Township have been unable to reach agreement, however, as to the terms of the agreements, because Concepts contended that the proposed agreements imposed conditions on the approval which were impermissible under the Municipalities Planning Code.

/s/ CARL L. LINDSAY, JR.
Carl L. Lindsay, Jr.

Sworn to and subscribed
before me this 8th day
of Sept., 1980.

GRETCHEN U. RICE
NOTARY PUBLIC

New Hope, Pa.

Comm. exp. 8/4/83

NOTE: Because of printing difficulties and excessive length, the exhibits to this affidavit are not reproduced here. They are appended to the copy of this affidavit which is contained in the Appendix used in the Court of Appeals. That Appendix has been certified by the Clerk of the Court of Appeals to the Clerk of this Court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-2888

HERITAGE FARMS, Inc., et al.,
Plaintiff

v.

SOLEBURY TOWNSHIP, et al.,
Defendants

AFFIDAVIT

EDWIN C. ANGSTADT, JR., being duly sworn according to law, deposes and states the following:

1. I am an attorney at law admitted to practice before the Supreme Court of the Commonwealth of Pennsylvania and before this Honorable Court, and have generally represented the plaintiffs in real estate development matters since 1974.

2. I have read the Complaint filed in this action and the affidavit of Carl L. Lindsay, Jr., Solebury Township Solicitor, appended to defendants' Motion to Abstain, and have reviewed the "facts" alleged therein.

3. I am presently familiar with the facts of this matter and with the subject matters addressed in Mr. Lindsay's affidavit, and am submitting the within statement of facts in response to the aforesaid affidavit.

LIMEPORT I BUILDING PERMITS

4. On November 15, 1977, the Board of Supervisors imposed an illegal and punitive ban on the issuance of *building* permits for this project. See minutes of meeting of Board of Supervisors dated November 15, 1977, page 2, a copy of which is attached hereto as Exhibit "1". The Supervisors knew and were aware that the imposition of this ban was illegal under Township Ordinances and were publicly advised of this illegality by their counsel prior to the imposition of the ban. See minutes of special meeting of Supervisors dated November 22, 1977, page 1, a copy of which is attached hereto as Exhibit "2". The ban on the issuance of building permits was reaffirmed and continued by the Supervisors at their meeting of December 20, 1977. See Opinion and Order of the Zoning Hearing Board attached as Exhibit "A" to the affidavit of Carl L. Lindsay, ("Lindsay Affidavit"), at page 2.

5. Prior to the imposition of this illegal ban in November of 1977, the building permit was sought for lots 3, 9 and 15 but were refused by the zoning officer. See paragraphs 4 and 5 of Opinion and Order of Zoning Hearing Board attached as Exhibit "A" to Lindsay Affidavit.

6. On January 26, 1978 the Zoning Hearing Board determined that the refusal to issue building permits and subsequent imposition of a ban on all building permits by the Board of Supervisors was wrongful and illegal. See Opinion and Order of Zoning Hearing Board attached as Exhibit "A" to Lindsay Affidavit. The Township did not appeal the Zoning Hearing Board's decision.

7. As a result of the refusal to issue building permits and the unlawful ban imposed by the Supervisors, the builder at Limeport was faced with total economic destruction and was forced into bankruptcy.

8. As a result of the illegal actions taken by the Supervisors, vituperative, abusive, hostile, false, misleading and one sided newspaper reports, represenative samples of which are attached hereto as Exhibit "3", received wide dissemination which reduced the marketability of plaintiff's projects and resulted in near riot conditions at Township meetings and formed the basis for much of the unwarranted resentment in the Township against plaintiffs.

LIMEPORT I ESCROW AGREEMENT

9. In the fall of 1977, the Board of Supervisors punitively and unlawfully refused to release money from the construction escrow account for work which had been completed and approved for payment by the Township engineer. To this date, the Supervisors have continued to refuse to release monies for the completed work done at Limeport.

10. As a result of their refusal to release the required sums, the road building contractor was not paid for approved work he performed which resulted in the contractor walking off the job.

11. Despite repeated efforts by the plaintiffs to secure the appropriate and necessary releases from escrow from the Township and to placate the contractor, the Township steadfastly refused such releases which resulted in the institution of suit by the contractor against the Township and the developer.

12. The only withdraws from the escrow account since the fall of 1977 were made by the Township for payments to itself for "administrative costs" no funds had been released for the work already completed and approved by the Township engineer, nor have any funds been released for work yet to be completed.

HIDDEN VALLEY SUBDIVISION

13. On October 26, 1977 the Board of Supervisors unlawfully denied preliminary plan approval for the Hidden Valley Subdivision and instead rejected such plan without regard to the plans conformance with all Township regulations and ordinances. See letter dated October 28, 1977 from Carl L. Lindsay, Jr., Esquire attached hereto as Exhibit "4".

14. The basis for the Supervisors' decision was known by them to be unlawful and without authorization, and represented an intrusion into the exclusive jurisdiction of the Department of Environmental Resources for the Commonwealth which was beyond the authority of the Supervisors, and contrary to the advice of counsel. See Exhibits "5" and "6" attached hereto.

15. As a result of the unlawful rejection of the Hidden Valley Preliminary Plans, plaintiff Concepts Plus, Inc., was forced to file a protective appeal from such decision.

16. Because of important time considerations regarding the waiting time for affirmative court release, the threat of losing another building season, and the increased construction cost, carrying charges and interest expenses which would have to be endured, plaintiff Concepts was forced to file revised plans despite its clear legal right to approval for the plans it has originally filed in an attempt to make some use of its property.

INGHAM MEWS

17. On June 3, 1980 the Board of Supervisors imposed an illegal, unwarranted and punitive ban on certificates of occupancy for the Ingham Mews Subdivision. This action was taken in complete and utter disregard of

existing Township ordinances and regulations, and directly opposite to the advice and counsel of the Solicitor to the Board of Supervisors. See excerpts from the deposition testimony of Ruth Milnor, Township secretary, taken September 4, 1980, at pages 155 and 156, attached hereto as Exhibit "7". As a result of this unlawful action, extremely adverse, hostile, one sided and misleading news articles were published describing the actions of the Supervisors which have resulted in the wide dissemination of adverse publicity concerning Ingham Mews and have caused a further decline of the marketability of the units within said Subdivision. See newspaper articles attached hereto as Exhibit "8".

18. The above illegal moratorium was imposed with no notice to plaintiffs, nor were plaintiffs given an opportunity to be heard.

19. The purported grounds for the illegal moratorium were spurious and without justification in that the Township engineer had ordered the removal and replacement of certain curb work within the Subdivision and the building and plumbing inspector had been aware that the pool was to be drained for a short period for normal, routine and required maintenance. The building and plumbing inspector had in fact granted a certificate of occupancy for the Subdivision during this period but prior to the imposition of moratorium by the Supervisors.

20. Despite this knowledge and the instructions of the Township engineer made known to the Supervisors, the moratorium was nevertheless instituted.

21. The "fire hazard" rationale offered by the Supervisors was at all times a spurious and false allegation as the pool was and is nearly a supplemental source of water.

Fire protection is provided to the Township by three independent fire companies each having tanker trucks and other sources of water for the fighting of fires. In addition, all construction within the Subdivision has utilized approved fireproof materials which confirm in all respects with applicable Township ordinances and regulations.

22. Once the Supervisors unlawful action was made known to Heritage Farms, Inc., repeated requests were made by Mr. Lamelza to the Supervisors to make a public statement that the required work on the pool was done with the knowledge of the building and plumbing inspector and the work on the curbing done at the specific instruction of the Township engineer and thus were proper and necessary. Despite these repeated requests and despite the known detrimental effects that the Supervisors action and subsequent newspaper articles were having on the project, no actions were taken by the Supervisors to exonerate Mr. Lamelza or to explain the necessity of his actions.

23. As part of the continued harassing and punitive actions taken by the Supervisors, an over reaching, unlawful and discriminatory Escrow Agreement was required for the Ingham Mews project.

24. Both the Supervisors and Mr. Lindsay were aware and acknowledged that part of the Escrow Agreement covered nonpublic improvements beyond the reach of the municipalities planning code and further acknowledged that practical problems with the Escrow Agreement exist.

25. Notwithstanding the mandate of law and the prior consistent practices of the Township, repeated unlawful refusals to release funds from Escrow were made by the Supervisors despite plaintiffs clear entitlement thereto.

26. Attempts to amend the Escrow Agreement initiated by the plaintiffs failed when the Township revoked the authority of Mr. Lindsay to correct the punitive and unfair operation of the account.

27. Despite the fact that *all* public improvements have been completed to date, the Supervisors to continue to unlawfully and unreasonably withhold releases from this Escrow Account

28. Upon the completion of the roadway system within the Subdivision, the Township engineer inspected and approved all of the work performed in connection with such roadways and recommended release of the escrow funds being retained for such construction.

29. Despite the final inspection and approval by the Township engineer of the roadway construction, the Supervisors have refused to accept dedication of the roadways on the basis of deminimous touch up work which had been completed under the direction and approval of the Township engineer and road master.

30. The Supervisors have continued to this date to refuse to accept dedication of the roadway system.

LAUREL HILL

31. On February 5, 1980, final plan approval for the proposed Laurel Hill Subdivision was obtained by the developer upon the condition that an acceptable escrow agreement be entered into.

32. Thereafter, the Township solicitor Mr. Lindsay, in express disregard of this condition, belatedly prepared an Escrow Agreement and also prepared a "required" development agreement, both of which contain unusual and onerous provisions.

33. Both Mr. Lindsay and the Supervisors were advised that the inclusion of these additional and onerous provisions violated that resolution of approval and subjected the developer to unnecessary, unusual and improper conditions and requirements not authorized by law and in contravention of the approval process.

34. Because of the pending closing deadline for the *property*, which fact was communicated to Mr. Lindsay, the Supervisors refused to eliminate these unlawful additional requirements and further refused to amend the documents prepared by Mr. Lindsay.

35. Despite repeated request to Mr. Lindsay to produce forms of documents proper for execution before the closing deadline for the property, Mr. Lindsay failed to do so.

36. As a result, in July of 1980, the property was lost.

37. In addition to the loss of the property, the developer also sustained substantial losses in excess of $70,000 representing the interest money paid upon the signing of the contract of sale, and the substantial engineering, legal and filing costs incurred in seeking plan approval.

38. Despite all attempts by the developer to seek some form of mutually acceptable procedure with respect to the actions taken by Mr. Lindsay, and despite the repeated notices of the intending deadline for closing, the Supervisors and Mr. Lindsay failed and refused to take the actions necessary and required, and at all time refused to conform to the conditions of approval. Copies of the relevant correspondence concerning the actions taken and the request on behalf of the developer are attached hereto collectively as Exhibit "9".

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF BUCKS }

I, EDWIN C. ANGSTADT, JR., being duly sworn according to law, depose and say that the foregoing statement of facts is true and correct to the best of my knowledge, information and belief.

/s/ EDWIN C. ANGSTADT, JR.

Sworn to and subscribed
before me this 17th day
of September, 1980.

CHARLOTTE FERENCE

NOTE: Because of printing difficulties and excessive length, the exhibits to this affidavit are not reproduced here. They are appended to the copy of this affidavit which is contained in the Appendix used in the Court of Appeals. That Appendix has been certified by the Clerk of the Court of Appeals to the Clerk of this Court.

THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE, Pa. Stat. Ann. tit. 53, § 10101 et seq. (Purdon 1972).

ARTICLE I. GENERAL PROVISIONS

§ 10101. Short title

This act shall be known and may be cited as the "Pennsylvania Municipalities Planning Code."

§ 10102. Effective date

This act shall take effect January 1, 1969. 1968, July 31, P.L. 805, art. I, § 102.

§ 10103. Construction of act

The provisions of this act shall not affect any act done, contract executed or liability incurred prior to its effective date, or affect any suit or prosecution pending or to be instituted, to enforce any right, rule, regulation, or ordinance or to punish any offense against any such repealed laws or against any ordinance enacted under them. All ordinances, resolutions, regulations and rules made pursuant to any act of Assembly repealed by this act shall continue in effect as if such act had not been repealed, except as the provisions are inconsistent herewith. The provisions of other acts relating to municipalities and townships are made a part of this act and this code shall be construed to give effect to all provisions of other acts not specifically repealed.

§ 10104. Constitutional construction

The provisions of this act shall be severable, and if any of its provisions shall be held to be unconstitutional, the validity of any of the remaining provisions of this act shall not be affected. It is hereby declared as the legislative intention that this act would have been adopted had such unconstitutional provision not been included therein.

§ 10105. Purpose of act

It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities, other than cities of the first and second class; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit municipalities, other than cities of the first and second class, to minimize such problems as may presently exist or which may be foreseen. It is the further intent of this act that any recommendations made by any planning agency to any governing body shall be advisory only.

§ 10106. Appropriations, grants and gifts

The governing body of every municipality is hereby authorized and empowered to make such appropriations as it may see fit, to accept gifts, grants or bequests from public and private sources for the purpose of carrying out the powers and duties conferred by this act, and to enter into agreements regarding the acceptance or utilization of such grants, gifts or bequests.

§ 10107. Definitions

As used in this act, except where the content clearly indicates otherwise, the following words or phrases have the meaning indicated below:

(1) "Applicant," a landowner or developer, as hereinafter defined, who has filed an application for development including his heirs, successors and assigns.

(2) "Application for development," every application, whether preliminary or final, required to be filed and approved prior to start of construction or development including but not limited to an application for a building permit, for the approval of a subdivision plat or plan or for the approval of a development plan.

(3) "Appointing authority," the mayor in cities; the chairman of the board of commissioners in counties; the council in incorporated towns and boroughs; the board of commissioners in townships of the first class; and the board of supervisors in townships of the second class; or as may be designated in the law providing for the form of government.

(4) "Common open space," a parcel or parcels of land or an area of water, or a combination of land and water within a development site and designed and intended for the use or enjoyment of residents of the planned residential development, not including streets, off-street parking areas, and areas set aside for public facilities.

(5) "City" or "cities," cities of the second class A and third class.

(6) "County," any county of the second class A through eighth classes.

(7) "Development plan," the provisions for development of a planned residential development, including a plat of subdivision, all covenants relating to use, location and bulk of buildings and other structures, intensity of use or density of development, streets, ways and parking facilities, common open space and public facilities. The

phrase "provisions of the development plan" when used in this act shall mean the written and graphic materials referred to in this definition.

(8) "Developer," any landowner, agent of such landowner or tenant with the permission of such landowner, who makes or causes to be made a subdivision of land or a land development.

(9) "Engineer," a professional engineer licensed as such in the Commonwealth of Pennsylvania, duly appointed as the engineer for a municipality, planning agency, or joint planning commission.

(10) "Governing body," the council in cities, boroughs and incorporated towns; the board of commissioners in townships of the first class; the board of supervisors in townships of the second class; the board of commissioners in counties of the second class A through eighth classes or as may be designated in the law providing for the form of government.

(11) "Land development," (i) the improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving (a) a group of two or more buildings, or (b) the division or allocation of land or space between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features; (ii) a subdivision of land.

(12) "Landowner," the legal or beneficial owner or owners of land including the holder of an option or contract to purchase (whether or not such option or contract is subject to any condition), a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land, shall be deemed to be a landowner for the purposes of this act.

(12.1) "Mobilehome," means a transportable, single family dwelling intended for permanent occupancy, office or place of assembly contained in one unit, or in two units designed to be joined into one integral unit capable of again being separated for repeated towing, which arrives at a site complete and ready for occupancy except for minor and incidental unpacking and assembly operations, and constructed so that it may be used without a permanent foundation.

(12.2) "Mobilehome lot," a parcel of land in a mobilehome park, improved with the necessary utility connections and other appurtenances necessary for the erections thereon of a single mobilehome, which is leased by the park owner to the occupants of the mobilehome erected on the lot.

(12.3) "Mobilehome park," a parcel of land under single ownership which has been planned and improved for the placement of mobilehomes for nontransient use, consisting of two or more mobilehome lots.

(13) "Municipality," any city of the second class A or third class, borough, incorporated town, township of the first or second class, county of the second class A through eighth class, or any similar general purpose unit of government which shall hereafter be created by the General Assembly.

(13.1) "Nonconforming use," means a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation.

(13.2) "Nonconforming structure," means a structure or part of a structure manifestly not designed to comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such structure lawfully existed prior to the enactment of such ordinance or amendment or prior to the application of such ordinance or amendment to its location by reason of annexation. Such nonconforming structures include, but are not limited to, nonconforming signs.

(14) "Planned residential development," an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, the development plan for which does not correspond in lot size, bulk or type of dwelling, density, lot coverage and required open space to the regulations established in any one residential district created, from time to time, under the provisions of a municipal zoning ordinance.

(15) "Planning agency," a planning commission, planning department, or a planning committee of the governing body.

(16) "Plat," the map or plan of a subdivision or land development, whether preliminary or final.

(17) "Public grounds," includes (i) parks, playgrounds and other public areas; and (ii) cites for schools, sewage treatment, refuse disposal and other publicly owned or operated facilities.

(18) "Public notice," notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall be not more than thirty days or less than fourteen days from the date of the hearing.

(19) "Street," includes street, avenue, boulevard, road, highway, freeway, parkway, lane, alley, viaduct and any other ways used or intended to be used by vehicular traffic or pedestrians whether public or private.

(20) "Structure," any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land.

(21) "Subdivision," the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, transfer of ownership or building or lot development: Provided, however, That the division of land for agricultural purposes into parcels of more than ten acres, not involving any new street or easement of access, shall be exempted.

ARTICLE II. PLANNING AGENCIES

§ 10201. Creation of planning agencies

The governing body of any municipality shall have the power to create or abolish, by ordinance, a planning commission or planning department, or both. An ordinance which creates both a planning commission and a planning department shall specify which of the powers and duties conferred on planning agencies by this act; each shall exercise and may confer upon each additional powers, duties and advisory functions not inconsistent with this act. In lieu of a planning commission or planning department, the governing body may elect to assign the powers and duties conferred by this act upon a planning committee comprised of members appointed from the governing body. The engineer for the municipality, or an engineer appointed by the governing body, shall serve the planning agency as engineering advisor.

§ 10202. Planning commission

If the governing body of any municipality shall elect to create a planning commission, such commission shall have not less than three nor more than nine members. All members of the commission shall serve without compensation, but may be reimbursed for necessary and reasonable expenses. However, elected or appointed officers or employes of the municipality shall not, by reason of membership thereon, forfeit the right to exercise the powers, perform the duties or receive the compensations of the municipal offices held by them during such membership.

§ 10203. Appointment, term and vacancy

All members of the commission shall be appointed by the appointing authority of the municipality. All such appointments shall be approved by the governing body, except where the governing body is the appointing authority. The term of each of the members of the commission shall be for four years, or until his successor is appointed and qualified, except that the terms of the members first appointed pursuant to this act shall be so fixed that on commissions of eight members or less no more than two shall be reappointed or replaced during any future calender year, and on commissions of nine members no more than three shall be so reappointed or replaced. The chairman of the planning commission shall promptly notify the appointing authority of the municipality concerning vacancies in the commission, and such vacancy shall be filled for the unexpired term.

§ 10204. Members of existing commissions

The members of any existing planning commission established under former laws shall continue in office until the end of the term for which they are appointed; their successors shall be appointed as provided by this act. If a vacancy shall occur otherwise than by expiration of term, it shall be filled by appointment for the unexpired term according to the terms of this article. Should the governing body of any municipality determine to increase the number of members of an already existing planning commission, the additional members shall be appointed as provided in this article. If the governing body of any municipality shall determine to reduce the number of members on any existing planning commission, such reduction shall be effectuated by allowing the terms to expire and by making no new appointments to fill the vacancy. Any reduction or increase shall be by ordinance.

§ 10205. Membership

All of the members of the planning commission shall be residents of the municipality. On all planning commissions appointed pursuant to this act, a certain number of the members, designated as citizen members shall not be officers or employes of the municipality. On a commission of three members at least two shall be citizen members. On a commission of four or five members at least three shall be citizen members. On a commission of either six or seven members at least five shall be citizen members, and on commissions of either eight or nine members at least six shall be citizen members.

§ 10206. Removal

Any member of a planning commission once qualified and appointed may be removed from office for malfeasance, misfeasance or nonfeasance in office or for other just cause by a majority vote of the governing body which appointed the member, taken after the member has received fifteen days' advance notice of the intent to take such a vote. A hearing shall be held in connection with the vote if the member shall request it in writing. Any appointment to fill a vacancy created by removal shall be only for the unexpired term.

§ 10207. Conduct of business

The commission shall elect its own chairman and vice-chairman and create and fill such other offices as it may determine. Officers shall serve annual terms and may succeed themselves. The commission may make and alter by laws and rules and regulations to govern its procedures consistent with the ordinances of the municipality and the laws of the Commonwealth. The commission shall keep a full record of its business and shall annually make a written report by March 1 of each year of its activities to the governing body. Interim reports may be made as often as may be necessary, or as requested by the governing body.

§ 10208. Planning department director

For the administration of each planning department, the appointing authority may appoint a director of planning who shall be, in the opinion of the appointing authority, qualified for the duties of his position. Each such appointment shall be with the approval of the governing body, except where the governing body is the appointing authority. The director of planning shall be in charge of the administration of the department, and shall exercise the powers and be subject to the duties that are granted or imposed on a planning agency by this act, except that where a municipality creates both a planning commission and a planning department, the director of planning shall exercise only those powers and be subject to only those duties which are specifically conferred upon him by ordinance enacted pursuant to this article.

§ 10209. Repealed. 1972, June 1, P.L. —, No. 93, § 2

§ 10209.1 Powers and duties of planning agency

(a) The planning agency shall at the request of the governing body have the power and shall be required to:

(1) Prepare the comprehensive plan for the development of the municipality as set forth in this act, and present it for the consideration of the governing body;

(2) Maintain and keep on file records of its action. All records and files of the planning agency shall be in the possession of the governing body.

(b) The planning agency at the request of the governing body may:

(1) Make recommendations to the governing body concerning the adoption or amendment of an official map;

(2) Prepare and present to the governing body of the municipality a zoning ordinance, and make recommendations to the governing body on proposed amendments to it as set forth in this act;

(3) Prepare, recommend and administer subdivision and land development, planned residential development regulations, as set forth in this act;

(4) Prepare and present to the governing body of the municipality a building code and a housing code and make recommendations concerning proposed amendments thereto;

(5) Do such other act or make such studies as may be necessary to fulfill the duties and obligations imposed by this act;

(6) Prepare and present to the governing body of the municipality an environmental study;

(7) Submit to the appointing authority of a municipality a recommended capital improvements program;

(8) Promote public interest in, and understanding of, the comprehensive plan and planning;

(9) Make recommendations to governmental, civic and private agencies and individuals as to the effectiveness of the proposals of such agencies and individuals;

(10) Hold public hearings and meetings;

(11) Require from other departments and agencies of the municipality such available information as relates to the work of the planning agency;

(12) In the performance of its functions, enter upon any land to make examinations and surveys with the consent of the owner.

(c) In the performance of its powers and duties, any act or recommendation of the planning agency which involves engineering consideration, shall be subject to review and comments of the engineer, which shall be incorporated and separately set forth in any report, written act or recommendation of the planning agency.

§10210. Administrative and technical assistance

The appointing authority may employ administrative and technical services to aid in carrying out the provisions of this act either as consultants on particular matters or as regular employes of the municipality. A county planning agency, with the consent of its governing body may perform planning services for any city, borough, incorporated town or township whose governing body requests such assistance and may enter into agreements or contracts for such work.

§ 10211. Assistance

The planning agency may, with the consent of the governing body, accept and utilize any funds, personnel or other assistance made available by the county, the Commonwealth or the Federal government or any of their agencies, or from private sources. The governing body may enter into agreements or contracts regarding the acceptance or utilization of the funds or assistance in accordance with the governmental procedures of the municipality.

ARTICLE III. COMPREHENSIVE PLAN

§ 10301. Preparation of comprehensive plan

The comprehensive plan, consisting of maps, charts and textual matter, shall indicate the recommendations of the planning agency for the continuing development of the municipality. The comprehensive plan shall include, but need not be limited to, the following related basic elements:

(1) A statement of objectives of the municipality concerning its future development;

(2) A plan for land use, which may include the amount, intensity, and character of land use proposed for residence, industry, business, agriculture, major traffic and transit facilities, public grounds, flood plans and other areas of special hazards and other similar uses;

(3) A plan for movement of people and goods, which may include expressways, highways, local street systems, parking facilities, mass transit routes, terminals, airfields, port facilities, railroad facilities and other similar facilities or uses;

(4) A plan for community facilities and utilities, which may include public and private education, recreation, municipal buildings, libraries, water supply, sewage disposal, refuse disposal, storm drainage, hospitals, and other similar uses; and

(5) A map or statement indicating the relationship of the municipality and its proposed development to adjacent municipalities and areas.

In preparing the comprehensive plan the planning agency shall make careful surveys and studies of existing conditions and prospects for future growth in the municipality.

§ 10302. Adoption of comprehensive plan

The governing body shall have the power to adopt and amend the comprehensive plan as a whole or in parts. Before adopting or amending a comprehensive plan, or any part thereof, there shall be at least one public hearing pursuant to public notice. The adoption of the comprehensive plan, or any part thereof, or any amendment thereto, shall be by resolution carried by the affirmative votes of not less than a majority of all the members of the governing body. The resolution shall refer expressly to the maps, charts, textual matter, and other matters intended to form the whole or part of the plan, and the action shall be recorded on the adopted plan or part.

§ 10303. Legal status of comprehensive plan within the jurisdiction that adopted the plan

Whenever the governing body, pursuant to public notice, has adopted a comprehensive plan or any part thereof, any subsequent proposed action of the governing body shall be submitted to the planning agency for its recommendations when the proposed action relates to:

(1) The location, opening, vacation, extension, widening, narrowing or enlargement of any street, public ground, pierhead or watercourse;

(2) The location, erection, demolition, removal or sale of any public structure located within the municipality; or

(3) The adoption, amendment or repeal of an official map, subdivision and land development ordinance, zoning ordinance or planned residential development ordinances.

The recommendations of the planning agency including a specific statement as to whether or not the proposed action is in accordance with the intent of the formally adopted comprehensive plan shall be made in writing to the governing body within thirty days.

§ 10304. Legal status of the county comprehensive plans within municipalities

Following the adoption of a comprehensive plan or any part thereof by a county, pursuant to a public notice, any proposed action of the governing body of a municipality within the county relating to (i) the location, opening, vacation, extension, widening, narrowing or enlargement of any street, public ground, pierhead or watercourse; (ii) the location, erection, demolition or sale of any public structures located within the municipality; or (iii) the adoption, amendment or repeal of any official map, subdivision or land ordinance, zoning ordinance or planned residential development ordinance shall be submitted to the county planning agency for its recommendations. The recommendation of the planning agency shall be made to the governing body of the municipality within forty-five days and the proposed action shall not be taken until such recommendation is made. If, however, the planning agency fails to act within forty-five days, the governing body shall proceed without its recommendation.

§ 10305. The legal status of comprehensive plans within school districts

Following the adoption of a comprehensive plan or any part thereof by any municipality or county governing body, pursuant to public notice, any proposed action of the governing body of any school district located within the municipality or county relating to the location, demolition, removal or sale of any school district structure or land shall be submitted to the municipal and county planning agency for their recommendations at least thirty days prior to the execution of such proposed action by the governing body of the school district.

§ 10306. Municipal and county comprehensive plans

When a city, borough, incorporated town or township having a comprehensive plan is located in a county which has adopted a comprehensive plan, both the county and the city, borough, incorporated town or township shall each give the plan of the other consideration in order that the objectives of each plan can be protected to the greatest extent possible.

ARTICLE IV. OFFICIAL MAP

§ 10401. Grant of power

The governing body of each municipality shall have the power to make or cause to be made surveys of the exact location of the lines of existing and proposed public streets, watercourses and public grounds, including widenings, narrowings, extensions, diminutions, openings or closing of same, for the whole of the municipality and, by ordinance, to adopt such surveys as the official map, or part thereof, of the municipality. The governing body, by amending ordinances, may make additions or modifications to the official map, or part thereof, by adopting surveys of the exact location of the lines of the public streets, watercourses or public grounds to be so added or modified and may also vacate any existing or proposed public street, watercourse or public ground contained in the official map, or part thereof.

§ 10402. Adoption of the official map and amendments thereto

Prior to the adoption of any survey of existing or proposed public streets, watercourses or public grounds as the official map, or part thereof, or any amendments to the official map, the governing body shall refer such surveys and amendments to the planning agency for review. The planning agency shall report its recommendations on said proposed official map, part thereof, or amendment thereto within forty days unless an extension of time shall be agreed to by the governing body. Before voting on the enactment of the proposed official map, part thereof, or amendment thereto, the governing body shall hold a public hearing thereon after giving public notice of such hearing.

§ 10403. Effect of approved plats on official map

After adoption of the official map, or part thereof, all streets, watercourses and public grounds on final, recorded plats which have been approved as provided by this act shall be deemed amendments to the official map. Notwithstanding any of the other terms of this article, no public hearing need be held or notice given if the amendment of the official map is the result of the addition of a plat which has been approved as provided by this act.

§ 10404. Effect of official map on mapped streets, watercourses and public grounds

The adoption of any street or street lines as part of the official map shall not, in and of itself, constitute or be deemed to constitute the opening or establishment of any street nor the taking or acceptance of any land for street purposes, nor shall it obligate the municipality to improve or maintain any such street. The adoption of proposed watercourses or public grounds as part of the official map shall not, in and of itself, constitute or be deemed to constitute a taking or acceptance of any land by the municipality.

§ 10405. Buildings in mapped streets, watercourses, and public grounds

For the purpose of preserving the integrity of the official map of the municipality, no permit shall be issued for any building within the lines of any street, watercourse or public ground shown or laid out on the official map. No person shall recover any damages for the taking for public use of any building or improvements constructed within the lines of any street, watercourse or public ground after the same shall have been included in the official map, and any such building or improvement shall be removed at the expense of the owner. However, when the property of which the reserved location forms a part, cannot yield a reasonable return to the owner unless a permit shall be granted, the owner may apply to the governing body for the grant of a permit to so build. Before granting any permit authorized in this section, the governing body shall give public notice and hold a public hearing at which all parties in interest shall have an opportunity to be heard. A refusal by the governing body to grant the permit applied for may be appealed by the applicant to court in the same manner, and within the same time limitation, as is provided for zoning appeals by this act.

§ 10406. Time limitations on reservations for future taking

The governing body may fix the time for which streets, watercourses and public grounds on the official map shall be deemed reserved for future taking or acquisition for public use. However, the reservation for public grounds shall lapse and become void one year after an owner of such property has submitted a written notice to the governing body announcing his intentions to build, subdivide or otherwise develop the land covered by the reservation, or has made formal application for an official permit to build a structure for private use, unless the governing body shall have acquired the property, or begun condemnation proceedings to acquire such property before the end of the year.

§ 10407. Release of damage claims or compensation

The governing body may designate any of its agencies to negotiate with the owner of land whereon reservations are made, releases of claims for damages or compensation for such reservations, or agreements, indemnifying the governing body from such claims by others, which releases or agreements when properly executed by the governing body and the owner and recorded shall be binding upon the successor in title.

§ 10408. Notice to other municipalities

When any county has adopted an official map in accordance with the terms of this article, a certified copy of the map and the ordinances adopting it shall be sent to every city, borough, incorporated town and township within said county. All amendments shall be sent to the aforementioned municipalities. The powers of the governing bodies of counties to adopt, amend and repeal official maps shall be limited to land and watercourses in those cities, boroughs, incorporated towns and townships wholly or partly within the county which have no official map in effect at the time an official map is introduced before the governing body of the county, and until the city, borough, incorporated town or township official map is in effect. The adoption of an official map by any municipality, other than a county, whose land or watercourses are subject to county official mapping, shall act as a repeal protanto of the county official map within the municipality adopting such ordinance. Notwithstanding any of the other terms or conditions of this section the county official map shall govern as to county streets and public grounds even though such streets or public grounds are located in a municipality which has adopted an official map. When a city, borough, incorporated town or township within a county which has adopted an official map also adopts such an official map a certified copy of the map, the ordinance adopting it and any later amendments shall be forwarded to the county planning agency, or if no such agency exists to the governing body of the county. Additionally, if any municipality adopts an official map, or amendment thereto, that shows any street intended to lead into any adjacent municipality a certified copy of said official map or amendment shall be forwarded to such adjacent municipality.

ARTICLE V. SUBDIVISION AND LAND DEVELOPMENT

§ 10501. Grant of power

The governing body of each municipality may regulate subdivisions and land development within the municipality by enacting a subdivision and land development ordinance. The ordinance may require that all plats of land lying within the municipality shall be submitted for approval to the governing body or in lieu thereof to a planning agency designated in the ordinance for this purpose. All powers granted herein to the governing body or the planning agency shall be exercised in accordance with the provisions of the subdivision and land development ordinance. In the case of any development governed by an ordinance adopted pursuant to Article VII, however, the applicable provisions of the subdivision and land development ordinance shall be as modified by such ordinance and the procedures which shall be followed in the approval of any plat and the rights and duties of the parties thereto shall be governed by Article VII and the provisions of the ordinance adopted thereunder. Provisions regulating mobilehome parks shall be set forth in separate and distinct articles of any subdivision and land development ordinance adopted pursuant to Article V, or any planned residential development ordinance adopted pursuant to Article VII.

§ 10502. Jurisdiction of county planning agencies; adoption by reference of county subdivision and land development ordinances

When any county has adopted a subdivision and land development ordinance in accordance with the terms of this article, a certified copy of the ordinance shall be sent to every city, borough, incorporated town or township within the county. All amendments shall also be sent to the aforementioned municipalities. The powers of governing bodies of counties to enact, amend and repeal subdivision and land development ordinances shall be limited to land in those cities, boroughs, incorporated towns and townships wholly or partly within the county which have no subdivision and land development ordinance in effect at the time a subdivision and land development ordinance is introduced before the governing body of the county, and until the city, borough, incorporated town or township subdivision and land development ordinance is in effect and a certified copy of such ordinance is filed with the county planning agency, if one exists. The enactment of a subdivision and land development ordinance by any municipality, other than a county, whose land is subject to a county subdivision and land development ordinance shall act as a repeal pro tanto of the county subdivision and land development ordinance within the municipality adopting such ordinance. However applications for subdivision and land development located within a city, borough, incorporated town or township having adopted a subdivision and land development ordinance as set forth in this article shall be forwarded upon receipt by the municipality to the county planning agency for review and report together with a fee sufficient to cover the costs of the review and report which fee shall be paid by the applicant: Provided, That such municipalities shall not approve such applications until the county report is received or until the expiration of forty-five days from the date the application was forwarded to the county.

Further, any municipality other than a county may adopt by reference the subdivision and land development ordinance of the county, and may by separate ordinance designate the county planning agency as its official administrative agency for review and approval of plats.

§ 10503. Contents of subdivision and land development ordinance

The subdivision and land development ordinance may include, but need not be limited to:

(1) Provisions for the submittal and processing of plats, and specifications for such plats, including provisions for preliminary and final approval and for processing of final approval by stages or sections of development.

(2) Provisions for insuring that: (i) the layout or arrangement of the subdivision or land development shall conform to the comprehensive plan and to any regulations or maps adopted in furtherance thereof; (ii) streets in and bordering a subdivision or land development shall be coordinated, and be of such widths and grades and in such locations as deemed necessary to accommodate prospective traffic, and facilitate fire protection; (iii) adequate easements or rights-of-way shall be provided for drainage and utilities; (iv) reservations if any by the developer of any area designed for use as public grounds shall be suitable size and location for their designated uses; (v) and land which is subject to flooding, subsidence or underground fires either shall be made safe for the purpose for which such land is proposed to be used, or that such land shall be set aside for uses which shall not endanger life or property or further aggravate or increase the existing menace.

(3) Provisions governing the standards by which streets shall be graded and improved, and walkways, curbs, gutters, street lights, fire hydrants, water and sewage facilities and other improvements shall be installed as a condition precedent to final approval of plats. The standards shall insure that the streets be improved to such a condition that the streets are passable for vehicles which are intended to use that street: Provided, however, that no municipality shall be required to accept such streets for public dedication until the streets meet such additional standards and specifications as the municipality may require for public dedication.

(4) Provisions which take into account land development not intended for the immediate erection of buildings where streets, curbs, gutters, street lights, fire hydrants, water and sewage facilities and other improvements may not be possible to install as a condition precedent to final

approval of plats, but will be a condition precedent to the erection of buildings on lands included in the approved plat.

(5) Provisions for encouraging and promoting flexibility economy and ingenuity in the layout and design of subdivisions and land developments including provisions authorizing the planning agency to alter site requirements and for encouraging other practices which are in accordance with modern and evolving principles of site planning and development.

§ 10504. Enactment of subdivision and land development ordinance

Before voting on the enactment of a proposed subdivision and land development ordinance, the governing body shall hold a public hearing thereon pursuant to public notice. A brief summary setting forth the principal provisions of the proposed ordinance and a reference to the place within the municipality where copies of the proposed ordinance may be secured or examined shall be incorporated in the public notice. Unless the proposed subdivision and land development ordinance shall have been prepared by the planning agency, the governing body shall submit the ordinance to the planning agency at least forty days prior to the hearing on such ordinance to provide the planning agency an opportunity to submit recommendations.

§ 10505. Enactment of subdivision and land development ordinance amendment

Amendments to the subdivision and land development ordinance shall become effective only after a public hearing held pursuant to public notice in the manner prescribed for enactment of a proposed ordinance by this article. In addition, in case of an amendment other than that prepared by the planning agency, the governing body shall submit each such amendment to the planning agency for recommendations at least thirty days prior to the date fixed for the public hearing on such proposed amendment.

§ 10506. Publication after enactment

After enactment, if the advertisement of a subdivision and land development ordinance or amendment is required by other laws respecting the advertisement of ordinances, such advertisements may consist solely of a reference to the place or places, within the municipality where copies of such ordinance or amendment shall be obtainable for a charge not greater than the cost thereof and available for examination without charge. Subdivision and land development ordinances and amendments may be incorporated into official ordinance books by reference with the same force and effect as if duly recorded therein.

§ 10507. Effect of subdivision and land development ordinance

Where a subdivision and land development ordinance has been enacted by a municipality under the authority of this article no subdivision or land development of any lot, tract or parcel of land shall be made, no street, sanitary sewer, storm sewer, water main or other improvements in connection therewith shall be laid out, constructed, opened or dedicated for public use or travel, or for the common use of occupants of buildings abutting thereon, except in accordance with the provisions of such ordinance.

§ 10508. Approval of plats

All applications for approval of a plat (other than those governed by Article VII), whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land development ordinance but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than ninety days following the date of the regular meeting of the governing body or the planning agency (whichever first reviews the application) next following the date the application is filed, provided that should the said next regular meeting occur more than thirty days following the filing of the application, the said ninety-day period shall be measured from the thirtieth day following the day the application has been filed.

(1) The decision of the governing body or the planning agency shall be in writing and shall be communicated to the applicant personally or mailed to him at his last known address not later than fifteen days following the decision;

(2) When the application is not approved in terms as filed the decision shall specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon;

(3) Failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented unless the applicant has agreed in writing to an extension of time or change in the prescribed manner of presentation of communication of the decision, in which case failure to meet the extended time or change in manner of presentation of communication shall have like effect;

(4) From the time an application for approval of a plat, whether preliminary or final, is duly filed as provided in the subdivision and land development ordinance, and while such application is pending approval or disapproval, no change or amendment of the zoning, subdivision or other governing ordinance or plan shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed. In addition, when a preliminary application has been duly approved, the applicant shall be entitled to final approval in accordance with the terms of the approved preliminary application as hereinafter provided. However, if an application is properly and finally denied, any subsequent application shall be subject to the intervening change in governing regulations. When an application for approval of a plat, whether preliminary or final, has been approved or approved subject to conditions acceptable to the applicant, no subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan shall be applied to affect adversely the right of the applicant to commence and to complete any aspect of the approved development in accordance with the terms of such approval within three years from such approval. Where final approval is preceded by preliminary approval, the three-year period shall be counted from the date of the preliminary approval. In the case of any doubt as to the terms of a preliminary approval, the terms shall be construed in the light of the provisions of the governing ordinances or plans as they stood at the time when the application for such approval was duly filed.

(5) Before acting on any subdivision plat, the governing body or the planning agency, as the case may be, may hold a public hearing thereon after public notice.

§ 10509. Completion of improvements or guarantee thereof prerequisite to final plat approval

No plat shall be finally approved unless the streets shown on such plat have been improved to a mud-free or otherwise permanently passable condition, or improved as may be required by the subdivision and land development ordinance and any walkways, curbs, gutters, street lights, fire hydrants, shade trees, water mains, sanitary sewers, storm drains and other improvements as may be required by the subdivision and land development ordinance have been installed in accordance with such ordinance. In lieu of the completion of any improvements required as a condition for the final approval of a plat, the subdivision and land development ordinance shall provide for the deposit with the municipality of financial security in an amount sufficient to cover the costs of any improvements or common amenities including, but not limited to, roads, storm water detention and/or retention basins and other related drainage facilities, recreational facilities, open space improvements, or buffer or screen plantings which may be required. Without limitation as to other types of financial security which the municipality may approve, which approval shall not be unreasonably withheld, Federal or Commonwealth chartered lending institution irrevocable letters of credit and restrictive or escrow accounts in such lending institutions shall be deemed acceptable financial security for the purposes of this section. Such financial security shall be posted with a bonding company or Federal or Commonwealth chartered lending institution chosen by the party posting the financial security, provided said bonding company or lending institution is authorized to conduct such business within the Commonwealth. Such bond, or other security shall provide for, and secure to the public, the completion of any improvements which may be required within one year of the date fixed in the subdivision plat for completion of such improvements. The amount of financial security shall be equal to one hundred ten percent of the cost of the required improvements for which financial security is to be posted. The cost of the improvements shall be established by submission to the governing body or the planning agency of bona fide bid or bids from the contractor or contractors chosen by the party posting the financial security to complete the improvements or, in the absence of such bona fide bids, the costs shall be established by estimate prepared by the municipality's engineer. If the party posting the financial security requires more than one year from the date of posting of the financial security to complete the required improvements, the amount of financial security may be increased by an additional ten percent for each one-year period beyond the first anniversary date from posting of financial security or to an amount not exceeding one hundred ten percent of the cost of completing the required improvements as reestablished on or about the expiration of the preceding one-year period by using the above bidding procedure. In the case where development is projected over a period of years, the governing body or the planning agency may authorize submission of final plats by section or stages of development subject to such requirements or guarantees as to improvements in future sections or stages of development as it finds essential for the protection of any finally approved section of the development. As the work of installing the required improvements proceeds, the party posting the financial security may request the governing body to release or authorize the release, from time to time, such portions of the financial security necessary for payment to the contractor or contractors performing the work. Any such requests shall be in writing addressed to the governing body, and the governing body shall have forty-five days from receipt of such request within which to allow the municipal engineer to certify, in writing, to the governing body that such portion of the work upon the improvements has been completed in accordance with the approved plat. Upon such certification the governing body shall authorize release by the bonding company or lending institution of an amount as estimated by the municipal engineer fairly representing the value of the improvements completed or, if the governing body fails to act within said forty-five-day period, the governing body shall be deemed to have approved the release of funds as requested. The governing body may, prior to final release at the time of completion and certification by its engineer, require retention of ten percent of the estimated cost of the aforesaid improvements. Where the governing body accepts dedication of all or some of the required improvements following completion, the governing body may require the posting of financial security to secure structural integrity of said improvements as well as the functioning of said improvements in accordance with the design and specifications as depicted on the final plat for a term not to exceed eighteen months from the date of acceptance of dedication. Said financial security shall be of the same type as otherwise required in this section with regard to installment of such improvements, and the amount of the financial security shall not exceed fifteen percent of the actual cost of installation of said improvements. If water mains or sanitary sewer lines, or both, along with apparatus or facilities related thereto, are to be installed under the jurisdiction and pursuant to the rules and regulations of a public utility or municipal authority separate and distinct from the municipality, financial security to assure proper completion and maintenance thereof shall be posted in accordance with the regulations of the controlling public utility or municipal authority and shall not be included within the financial security as otherwise required by this section. If financial security has been provided in lieu of the completion of improvements required as a condition for the final approval of a plat as set forth in this section, the municipality shall not condition the issuance of building, grading or other permits relating to the erection or placement of improvements, including buildings, upon the lots or land as depicted upon the final plat upon actual completion of the improvements depicted upon the approved final plat. Moreover, if said financial security has been provided, occupancy permits for any building or buildings to be erected shall not be withheld following: the improvement of the streets providing access to and from existing public roads to such building or buildings to a mud-free or otherwise permanently passable condition, as well as the completion of all other improvements as depicted upon the approved plat, either upon the lot or lots or beyond the lot or lots in question if such improvements are necessary for the reasonable use of or occupancy of the building or buildings. Any ordinance or statute inconsistent herewith is hereby expressly repealed.

§ 10510. Release from improvement bond

(a) When the developer has completed all of the necessary and appropriate improvements, the developer shall notify the municipal governing body, in writing, by certified or registered mail, of the completion of the aforesaid improvements and shall send a copy thereof to the municipal engineer. The municipal governing body shall, within ten days after receipt of such notice, direct and authorize the municipal engineer to inspect all of the aforesaid improvements. The municipal engineer shall, thereupon, file a report, in writing, with the municipal governing body, and shall promptly mail a copy of the same to the developer by certified or registered mail. The report shall be made and mailed within thirty days after receipt by the municipal engineer of the aforesaid authorization from the governing body; said report shall be detailed and shall indicate approval or rejection of said improvements, either in whole or in part, and if said improvements, or any portion thereof, shall not be approved or shall be rejected by the municipal engineer, said report shall contain a statement of reasons for such nonapproval or rejection.

(b) The municipal governing body shall notify the developer, in writing by certified or registered mail of the action of said municipal governing body with relation thereto.

(c) If the municipal governing body or the municipal engineer fails to comply with the time limitation provisions contained herein, all improvements will be deemed to have been approved and the developer shall be released from all liability, pursuant to its performance guaranty bond or other security agreement.

(d) If any portion of the said improvements shall not be approved or shall be rejected by the municipal governing body, the developer shall proceed to complete the same and, upon completion, the same procedure of notification, as outlined herein, shall be followed.

(e) Nothing herein, however, shall be construed in limitation of the developer's right to contest or question by legal proceedings or otherwise, any determination of the municipal governing body or the municipal engineer.

(f) Where herein reference is made to the municipal engineer he shall be a duly registered professional engineer employed by the municipality or engaged as a consultant thereto.

§ 10511. Remedies to effect completion of improvements

In the event that any improvements which may be required have not been installed as provided in the subdivision and land development ordinance or in accord with the approved final plat the governing body of the municipality is hereby granted the power to enforce any corporate bond, or other security by appropriate legal and equitable remedies. If proceeds of such bond, or other security are insufficient to pay the cost of installing or making repairs or corrections to all the improvements covered by said security, the governing body of the municipality may, at its option, install part of such improvements in all or part of the subdivision or land development and may institute appropriate legal or equitable action to recover the moneys necessary to complete the remainder of the improvements. All of the proceeds, whether resulting from the security or from any legal or equitable action brought against the developer, or both, shall be used solely for the installation of the improvements covered by such security, and not for any other municipal purpose.

§ 10512. Repealed. 1972, June 1, P.L. —, No. 93, § 5

§ 10513. Recording plat

(a) Upon the approval of a final plat, the developer shall within ninety days of such final approval record such plat in the office of the recorder of deeds of the county in which the municipality is located. Whenever plat approval is required by a municipality, the recorder of deeds of the county shall not accept any plat for recording unless such plat officially notes the approval of the governing body.

(b) The recording of the plat shall not constitute grounds for assessment increases until such time as lots are sold or improvements are installed on the land included within the subject plat.

§ 10514. Effect of plat approval on official map

After a plat has been approved and recorded as provided in this article, all streets and public grounds on such plat shall be, and become a part of the official map of the municipality without public hearing.

§ 10515. Penalties

Any person, partnership, or corporation who or which being the owner or agent of the owner of any lot, tract or parcel of land shall lay out, construct, open or dedicate any street, sanitary sewer, storm sewer, water main or other improvements for public use, travel or other purposes or for the common use of occupants of buildings abutting thereon, or who sells, transfers or agrees or enters into an agreement to sell any land in a subdivision or land development whether by reference to or by other use of a plat of such subdivision or land development or erect any building thereon, unless and until a final plat has been prepared in full compliance with the provisions of this act and of the regulations adopted hereunder and has been recorded as provided herein, shall be guilty of a misdemeanor, and upon conviction thereof, such person, or the members of such partnership, or the officers of such corporation, or the agent of any of them, responsible for such violation pay a fine not exceeding one thousand dollars ($1,000) per lot or parcel or per dwelling within each lot or parcel. All fines collected for such violations shall be paid over to the municipality whose ordinance has been violated. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the seller or transferor from such penalties or from the remedies herein provided.

§ 10516. Repealed. 1972, June 1, P.L. —, No. 93, § 7

ARTICLE VI. ZONING

§ 10601. General powers

The governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.

§ 10602. County powers

The powers of the governing bodies of counties to enact, amend and repeal zoning ordinances shall be limited to land in those cities, boroughs, incorporated towns and townships, wholly or partly within the county,[1] which have no zoning ordinance in effect at the time a zoning ordinance is introduced before the governing body of the county and until the city, borough, incorporated town or township zoning ordinance is in effect. The enactment of a zoning ordinance by any municipality, other than the county, whose land is subject to county zoning shall act as a repeal protanto of the county zoning ordinance within the municipality adopting such ordinance.

§ 10603. Ordinance provisions

Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water;

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures;

(4) Density of population and intensity of use.

In addition, zoning ordinances may contain:

(1) Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) Provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency, pursuant to express standards and criteria set forth in the ordinances;

(3) Provisions for the administration and enforcement of such ordinances;

(4) Such other provisions as may be necessary to implement the purposes of this act; and

(5) Provisions for the protection and preservation of natural resources and agricultural land and activities.

§ 10604. Zoning purposes

The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate one or more of the following: the public health, safety, morals, general welfare, coordinated and practical community development, proper density of population, civil defense, disaster evacuation, airports, and national defense facilities, the provisions of adequate light and air, police pro-

tection, vehicle parking and loading space, transportation, water, sewerage, schools, public grounds and other public requirements, as well as

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers. Zoning ordinances shall be made in accordance with an overall program, and with consideration for the character of the municipality, its various parts and the suitability of the various parts for particular uses and structures.

(3) To preserve prime agriculture and farmland considering topography, soil type and classification, and present use.

§ 10605. Classifications

In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district:

(1) For the purpose of making transitional provisions at and near the boundaries of districts, and

(1.1) For the purpose of regulating nonconforming uses and structures, and

(2) For the regulation, restriction or prohibition of uses and structures at or near (i) major thoroughfares,

their intersections and interchanges, and transportation arteries, (ii) natural or artificial bodies of water, (iii) places of relatively steep slope or grade, or other areas of hazardous geological or topographic features, (iv) public buildings and public grounds, (v) aircraft, helicopter, rocket, and spacecraft facilities, (vi) places having unique historical or patriotic interest or value, (vii) flood plain areas, and other places having a special character or use affecting and affected by their surroundings. As among several classes of zoning districts, the provisions for permitted uses may be mutually exclusive, in whole or in part.

§ 10606. Statement of community development objectives

Each zoning ordinance enacted after the effective date of this act shall contain a statement of community development objectives. This statement may be supplied by reference to the community comprehensive plan or such portions of the community comprehensive plan as may exist and be applicable or to a statement of legislative findings of the governing body of the political subdivision, having a bearing on the community comprehensive plan, with respect to land use, density of population, and location and function of streets and other community facilities and utilities, together with any other factors that the municipality believes relevant in describing the purposes and intent of such ordinance. With respect to zoning ordinaces enacted prior to the effective date of this act, a statement of community development objectives shall be supplied by amendment to the zoning ordinance within three years from the effective date of this act.

§ 10607. Preparation of proposed zoning ordinance

The planning agency of each municipality shall prepare the text and map of the proposed zoning ordinance as well as make all necessary studies and surveys preliminary thereto, whenever instructed to do so by the governing body. In preparing a proposed zoning ordinance, the planning agency shall hold at least one public hearing pursuant to public notice and may hold additional public hearings upon such notice as it shall determine to be advisable. Upon the completion of its work, the planning agency shall present to the governing body the proposed zoning ordinance, together with recommendations and explanatory materials. The procedure set forth in this section shall be a condition precedent to the validity of a zoning ordinance adopted pursuant to this act. If a county planning agency shall have been created for the county in which the city, borough, incorporated town or township adopting the ordinance is located, then at least thirty days prior to the submission of the ordinance to the local governing body, the city, borough, incorporated town or township planning agency shall submit the proposed ordinance to said county planning agency for recommendations.

§ 10608. Enactment of zoning ordinance

Before voting on the enactment of a zoning ordinance, the governing body shall hold a public hearing thereon, pursuant to public notice. The vote on the enactment by the governing body shall be within ninety days after the public hearing.

§ 10609. Enactment of zoning ordinance amendments

For the preparation of amendments to zoning ordinances, the procedure set forth in this article for the preparation of a proposed zoning ordinance shall be permissive. Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. In the case of an amendment other than that prepared by the planning agency, the governing body shall submit each such amendment to the planning agency at least thirty days prior to the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations. If, after any public hearing held upon an amendment, the proposed amendment is revised, or further revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment. If a county planning agency shall have been created for the county in which the city, borough, incorporated town or township adopting the ordinance is located, then at least thirty days prior to the hearing on the ordinance by the local governing body, the city, borough, incorporated town or township planning agency shall submit the proposed ordinance to the county planning agency for recommendations.

§ 10609.1 Procedure upon curative amendments

A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004. The governing body shall commence a hearing thereon within sixty days of the request as provided in section 1004. The curative amendment shall be referred to the planning agency or agencies as provided in section 609 and notice of the hearing thereon shall be given as provided in section 610 and in section 1004. The hearing shall be conducted in accordance with subsections (4) to (8) of section 908 and all references therein to the zoning hearing board shall, for purposes of this section be references to the governing body.

§ 10609.2 Procedure upon municipal curative amendments

(1) A municipality, by formal action, may declare its zoning ordinance or portions thereof substantially invalid and propose to prepare a curative amendment to overcome such invalidity. Within thirty days following such declaration and proposal the governing body of the municipality shall:

(a) By resolution make specific findings setting forth the declared invalidity of the zoning ordinance which may include: (i) references to specific uses which are either not permitted or not permitted in sufficient quantity, (ii) reference to a class of use or uses which require revision, or (iii) reference to the entire ordinance which requires revisions.

(b) Begin to prepare and consider a curative amendment to the zoning ordinance to correct the declared invalidity.

(2) Within one hundred eighty days from the date of the declaration and proposal, the municipality shall enact a curative amendment to, or reaffirm the validity of, its zoning ordinance pursuant to the provisions required by section 609, to cure the declared invalidity of the zoning ordinance.

(3) Upon the initiation of the procedures, as set forth in subsection (1), the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1 nor shall the Zoning Hearing Board be required to give a report requested under section 910 or 913.1 subsequent to the declaration

and proposal based upon the grounds identical to or substantially similar to those specified in the resolution required by subsection (1)(a). Upon completion of the procedures as set forth in subsections (1) and (2), no rights to a cure pursuant to the provisions of sections 609.1 and 1004 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section.

(4) A municipality having utilized the procedures as set forth in subsections (1) and (2) may not again utilize said procedure for a thirty-six-month period following the date of the enactment of a curative amendment, or reaffirmation of the validity of its zoning ordinance, pursuant to subsection (2); provided, however, if after the date of declaration and proposal there is a substantially new duty or obligation imposed upon the municipality by virtue of a change in statute or by virtue of a Pennsylvania Appellate Court decision, the municipality may utilize the provisions of this section to prepare a curative amendment to its ordinance to fulfill said duty or obligation.

§ 10610. Content of public notice

Public notices of proposed zoning ordinances and amendments shall include either the full text thereof, or a brief summary setting forth the principal provisions in reasonable detail, and a reference to a place within the municipality where copies of the proposed ordinance or amendment may be examined, in addition to the time and place of hearing.

§ 10611. Publication after enactment

After enactment, if the advertisement of a zoning ordinance or amendment is required by other laws respecting the advertisement of ordinances, such advertisement may consist solely of a reference to the place or places within the municipality where copies of such ordinance or amendment shall be obtainable for a charge not greater than the cost thereof and available for examination without charge. Zoning ordinances and amendments may be incorporated into official ordinance books by reference with the same force and effect as if duly recorded therein.

§ 10612. Repealed. 1972, June 1, P.L. —, No. 93, § 11

§ 10613. Registration of nonconforming uses

Zoning ordinances shall contain provisions requiring the zoning officer to identify and register nonconforming uses and nonconforming structures.

§ 10614. Appointment and powers of zoning officer

For the administration of a zoning ordinance, a zoning officer, who may not hold any elective office in the municipality, shall be appointed. The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.

§ 10615. Zoning appeals

All appeals from decisions of the zoning officer shall be taken in the manner set forth in this act.

§ 10616. Enforcement penalties

Any person, partnership or corporation who or which shall violate the provisions of any zoning ordinance enacted under this act or prior enabling laws shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of not more than five hundred dollars ($500). In default of payment of the fine, such person, the members of such partnership, or the officers of such corporation shall be liable to imprisonment for not more than sixty days. Each day that a violation is continued shall constitute a separate offense. All fines collected for the violation of zoning ordinances shall be paid over to the municipality whose ordinance has been violated.

§ 10617. Enforcement remedies

In case any building, structure, or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, with the approval of the governing body, an officer of the municipality, in addition to other remedies, may institute in the name of the municipality any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.

§ 10618. Finances

The governing body may appropriate from general funds moneys to finance the preparation, administration and enforcement of zoning ordinances, to finance the work of the zoning hearing board and to support or oppose, upon appeal to the courts, decisions of the zoning hearing board. For the same purposes, the governing body may accept gifts and grants of money and services from private sources and from the county, State and Federal governments. The governing body may prescribe reasonable fees to be charged with respect to the administration of a zoning ordinance.

§ 10619. Exemptions

This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.

§ 10620. Repealed. 1972, June 1, P.L. —, No. 93, § 13

ARTICLE VII. PLANNED RESIDENTIAL DEVELOPMENT

§ 10701. Purposes

In order that the purposes of this act be furthered in an era of increasing urbanization and of growing demand for housing of all types and design; to insure that the provisions of Article VI which are concerned in part with the uniform treatment of dwelling type, bulk, density and open space within each zoning district, shall not be applied to the improvement of land by other than lot by lot development in a manner that would distort the objectives of that Article VI; to encourage innovations in residential development and renewal so that the growing demand for housing may be met by greater variety in type, design and layout of dwellings and by the conservation and more efficient use of open space ancillary to said dwellings; so that greater opportunities for better housing and recreation may extend to all citizens and residents of this State; and in order to encourage a more efficient use of land and of public services and to reflect changes in the technology of land development so that economies secured may enure to the benefit of those who need homes; and, in aid of these purposes, to provide a procedure which can relate the type, design and layout of residential development to the particular site and the particular demand for housing existing at the time of development in a manner consistent with the preservation of the property values within existing residential areas, and to insure that the increased flexibility of regulations over land development authorized herein is carried out under such administrative standards and procedures as shall encourage the disposition of proposals for land development without undue delay, the following powers are granted to all municipalities.

§ 10702. Grant of power

The governing body of each municipality may enact, amend and repeal ordinances fixing standards and conditions for planned residential development. The enactment of such ordinances shall be in accordance with the procedures required for the enactment of an amendment of a zoning ordinance as provided in Article VI of this act. Pursuant to such ordinances the governing body may approve, modify or disapprove any development plan within the municipality adopting such ordinances or designate the planning agency, or any other committee, commission or office as its official agency for such purposes. Such ordinances shall:

(1) Specify the body, agency or office within the municipality which shall administer planned residential development ordinances pursuant to the provisions of this article;

(2) Set forth the standards, conditions and regulations for a planned residential development consistent with the provisions of this article; and

(3) Set forth the procedures pertaining to the application for, hearing on and tentative and final approval of a planned residential development, which shall be consistent

with the provisions of this article for such applications and hearings.

§ 10703. Application of comprehensive plan

Every ordinance and all amendments thereto adopted pursuant to this article shall be based on and interpreted in relation to the comprehensive plan for the development of the municipality prepared under the provisions of this act. Every application for approval of a planned residential development shall be based on and interpreted in relation to such comprehensive plan.

§ 10704. Jurisdiction of county planning agencies

When any county has adopted a planned residential development ordinance in accordance with the terms of this article, a certified copy of the ordinance shall be sent to every city, borough, incorporated town or township within the county. All amendments shall also be sent to the aforementioned municipalities. The powers of governing bodies of counties to enact, amend and repeal planned residential development ordinances shall not supersede any local planned residential development, zoning or subdivision and land development ordinance which is already in effect or subsequently becomes effective in any city, borough, incorporated town or township within such county, provided that a certified copy of each such ordinance is filed with the county planning agency, if one exists. However, all applications for tentative approval of planned residential development of land located within a city, borough, incorporated town or township having adopted a planned residential development ordinance as set forth in this article shall nevertheless be referred to the county planning agency, if one exists, for study and recommendation and such county planning agency shall be required to report to such municipality within thirty days or forfeit the right to review. Further, any city, borough, incorporated town or township may designate the county planning agency as its official agency for review and approval of planned residential development applications.

§ 10705. Standards and conditions for planned residential development

Every ordinance adopted pursuant to the provisions of this article shall set forth all the standards, conditions and regulations by which a proposed planned residential development shall be evaluated, and said standards, conditions and regulations shall be consistent with the following provisions:

(a) The ordinance adopted pursuant to this article shall set forth the uses permitted in a planned residential development, which uses may include and shall be limited to:

(1) Dwelling units in detached, semi-detached, attached or multi-storied structures, or any combination thereof; and (2) those nonresidential uses deemed to be appropriate for incorporation in the design of the planned residential development. The ordinance may establish regulations setting forth the timing of development among the various types of dwellings and may specify whether some or all nonresidential uses are to be built before, after or at the same time as the residential uses.

(b) The ordinance adopted pursuant to this article shall establish standards governing the density, or intensity of land use, in a planned residential development. The standards may vary the density or intensity of land use, otherwise applicable to the land under the provisions of a zoning ordinance of the municipality within the planned residential development in consideration of:

(1) The amount, location and proposed use of common open space;

(2) The location and physical characteristics of the site of the proposed planned residential development; and

(3) The location, design, type and use of structures proposed.

(c) In the case of a planned residential development proposed to be developed over a period of years, standards established in an ordinance adopted pursuant to this article may, to encourage the flexibility of housing density, design and type intended by this article, permit a variation in each section to be developed from the density, or intensity of use, established for the entire planned residential development. The ordinance may include provisions to allow for a greater concentration of density, of intensity of land use, within some section or sections of development, whether it be earlier or later in the development than upon others. The ordinance may require that the approval of such greater concentration of density of land use for any section to be developed be offset by a smaller concentration in any completed prior stage or by an appropriate reservation of common open space on the remaining land by a grant of easement or by covenant in favor of the municipality, provided that such reservation shall, as far as practicable, defer the precise location of such common open space until an application for final approval is filed, so that flexibility of development which is a prime objective of this article, can be maintained.

(d) The standards for a planned residential development established by an ordinance adopted pursuant to this article may require that the common open space resulting from the application of standards for density, or intensity of land use, shall be set aside for the use and benefit of the residents in such development and may include provisions which shall determine the amount and location of said common open space and secure its improvement and maintenance for common open space use, subject, however, to the following:

(1) The municipality may, at any time and from time to time, accept the dedication of land or any interest therein for public use and maintenance, but the municipality need not require, as a condition of the approval of a planned residential development, that land proposed to be set aside for common open space be dedicated or made available to public use. The ordinance may require that the landowner provide for and establish an organization for the ownership and maintenance of the common open space, and that such organization shall not be dissolved nor shall it dispose of the common open space, by sale or otherwise (except to an organization conceived and established to own and maintain the common open space), without first offering to dedicate the same to the public.

(f) The authority granted a municipality by Article V to establish standards for the location, width, course and surfacing of streets, walkways, curbs, gutters, street lights, shade trees, water, sewage and drainage facilities, easements or rights-of-way for drainage and utilities, reservations of public grounds and other improvements, shall be vested in the governing body or its designated agency for the purposes of this article. The standards applicable to a particular planned residential development may be different than or modifications of, the standards and requirements otherwise required of subdivisions authorized under an ordinance adopted pursuant to Article V, provided, however, that an ordinance adopted pursuant to this article shall set forth the limits and extent of any modifications or changes in such standards and requirements in order that a landowner shall know the limits and extent of permissible modifications from the standards otherwise applicable to subdivisions.

(g) An ordinance adopted pursuant to this article shall set forth the standards and criteria by which the design, bulk and location of buildings shall be evaluated, and all such standards and criteria for any feature of a planned residential development shall be set forth in such ordinance with sufficient certainty to provide reasonable criteria by which specific proposals for a planned residential development can be evaluated. All standards in such ordinance shall not unreasonably restrict the ability of the landowner to relate his development plan to the particular site and to the particular demand for housing existing at the time of development.

§ 10706. Enforcement and modification of provisions of the plan

To further the mutual interest of the residents of the planned residential development and of the public in the preservation of the integrity of the development plan, as finally approved, and to insure that modifications, if any, in the development plan shall not impair the reasonable reliance of the said residents upon the provisions of the development plan, nor result in changes that would adversely affect the public interest, the enforcement and modification of the provisions of the development plan as finally improved, whether those are recorded by plat, covenant, easement or otherwise shall be subject to the following provisions:

(1) The provisions of the development plan relating to (i) the use, bulk and location of buildings and structures, (ii) the quantity and location of common open space, except as otherwise provided in this article, and

(iii) the intensity of use or the density of residential units, shall run in favor of the municipality and shall be enforceable in law or in equity by the municipality, without limitation on any powers of regulation otherwise granted the municipality by law.

(2) All provisions of the development plan shall run in favor of the residents of the planned residential development but only to the extent expressly provided in the development plan and in accordance with the terms of the development plan, and to that extent said provisions, whether recorded by plat, covenant, easement or otherwise, may be enforced at law or equity by said residents acting individually, jointly, or through an organization designated in the development plan to act on their behalf; provided, however, that no provisions of the development plan shall be implied to exist in favor of residents of the planned residential development except as to those portions of the development plan which have been finally approved and have been recorded.

(3) All those provisions of the development plan authorized to be enforced by the municipality under this section may be modified, removed, or released by the municipality, except grants or easements relating to the service or equipment of a public utility, subject to the following conditions; (i) no such modification, removal or release of the provisions of the development plan by the municipality shall affect the rights of the residents of the planned residential development to maintain and enforce those provisions, at law or equity, as provided in this section; (ii) no modification, removal or release of the provisions of the development plan by the municipality shall be permitted except upon a finding by the governing body or its designated agency, following a public hearing thereon pursuant to public notice called and held in ac-

cordance with the provisions of this article, that the same is consistent with the efficient development and preservation of the entire planned residential development, does not adversely affect either the enjoyment of land abutting upon or across the street from the planned residential development or the public interest, and is not granted solely to confer a special benefit upon any person.

(4) Residents of the planned residential development may, to the extent and in the manner expressly authorized by the provisions of the development plan, modify, remove or release their rights to enforce the provisions of the development plan but no such action shall affect the right of the municipality to enforce the provisions of the development plan in accordance with the provisions of this section.

§ 10707. Application for tentative approval of planned residential development

In order to provide an expeditious method for processing a development plan for a planned residential development under the terms of an ordinance adopted pursuant to the powers granted herein, and to avoid the delay and uncertainty which would arise if it were necessary to secure approval, by a multiplicity of local procedures, of a plat of subdivision as well as approval of a change in the zoning regulations otherwise applicable to the property, it is hereby declared to be in the public interest that all procedures with respect to the approval or disapproval of a development plan for a planned residential development and the continuing administration thereof shall be consistent with the following provisions:

(1) An application for tentative approval of the development plan for a planned residential development shall be filed by or on behalf of the landowner;

(2) The application for tentative approval shall be filed by the landowner in such form, upon the payment of such a reasonable fee and with such officials of the municipality as shall be designated in the ordinance adopted pursuant to this article;

(3) All planning, zoning and subdivision matters relating to the platting, use and development of the planned residential development and subsequent modifications of the regulations relating thereto, to the extent such modification is vested in the municipality, shall be determined and established by the governing body or its designated agency;

(4) The ordinance shall require only such information in the application as is reasonably necessary to disclose to the governing body or its designated agency: (i) the location, size and topography of the site and the nature of the landowner's interest in the land proposed to be developed; (ii) the density of land use to be allocated to parts of the site to be developed; (iii) the location and size of the common open space and the form of organization proposed to own and maintain the common open space; (iv) the use and the approximate height, bulk and location of buildings and other structures; (v) the feasibility of proposals for the disposition of sanitary waste and storm water; (vi) the substance of covenants, grants of easements or other restrictions proposed to be imposed upon the use of the land, buildings and structures including proposed easements or grants for public utilities; (vii) the provisions for parking of vehicles and the location and width of proposed streets and public ways; (viii) the required modifications in the municipal land use regulations otherwise applicable to the subject property; and (ix) in the case of development plans which call for development over a period of years, a schedule showing the proposed

times within which applications for final approval of all sections of the planned residential development are intended to be filed and this schedule must be updated annually, on the anniversary of its approval, until the development is completed and accepted;

(5) The application for tentative approval of a planned residential development shall include a written statement by the landowner setting forth the reasons why, in his opinion, a planned residential development would be in the public interest and would be consistent with the comprehensive plan for the development of the municipality; and

(6) The application for and tentative and final approval of a development plan for a planned residential development prescribed in this article shall be in lieu of all other procedures or approvals, otherwise required pursuant to Article V and VI of this act.

§ 10708. Public hearings

(a) Within sixty days after the filing of an application for tentative approval of a planned residential development pursuant to this article, a public hearing pursuant to public notice on said application shall be held by the governing body in the manner prescribed in Article VI for the enactment of an amendment to a zoning ordinance. The chairman, or, in his absence, the acting chairman, of the governing body or its designated agency may administer oaths and compel the attendance of witnesses. All testimony by witnesses at any hearing shall be given under oath and every party of record at a hearing shall have the right to cross-examine adverse witnesses.

(b) A verbatim record of the hearing shall be caused to be made by the governing body whenever such records are requested by any party to the proceedings; but the cost of making and transcribing such a record shall be borne by the party requesting it and the expense of copies of such record shall be borne by those who wish to obtain such copies. All exhibits accepted in evidence shall be identified and duly preserved or, if not accepted in evidence, shall be properly identified and the reason for the exclusion clearly noted in the record.

(c) The governing body may continue the hearing from time to time, and may refer the matter back to the planning agency for a report, provided, however, that in any event, the public hearing or hearings shall be concluded within sixty days after the date of the first public hearing.

§ 10709. The findings

(a) The governing body, within sixty days following the conclusion of the public hearing provided for in this article, shall, by official written communication, to the landowner, either:

(1) Grant tentative approval of the development plan as submitted;

(2) Grant tentative approval subject to specified conditions not included in the development plan as submitted; or

(3) Deny tentative approval to the development plan.

Failure to so act within said period shall be deemed to be a grant of tentative approval of the development plan as submitted. In the event, however, that tentative approval is granted subject to conditions, the landowner may, within thirty days after receiving a copy of the official written communication of the governing body notify such governing body of his refusal to accept all said conditions, in which case, the governing body shall be deemed to have denied tentative approval of the development plan. In the event the landowner does not, within said period, notify the governing body of his refusal to accept all said conditions, tentative approval of the development plan, with all said conditions, shall stand as granted.

(b) The grant or denial of tentative approval by official written communication shall include not only conclusions but also findings of fact related to the specific proposal and shall set forth the reasons for the grant, with or without conditions, or for the denial, and said communication shall set forth with particularity in what respects the development plan would or would not be in the public interest including but not limited to findings of fact and conclusions on the following:

(1) In those respects in which the development plan is or is not consistent with the comprehensive plan for the development of the municipality;

(2) The extent to which the development plan departs from zoning and subdivision regulations otherwise applicable to the subject property, including but not limited to density, bulk and use, and the reasons why such departures are or are not deemed to be in the public interest;

(3) The purpose, location and amount of the common open space in the planned residential development, the reliability of the proposals for maintenance and conservation of the common open space, and the adequacy or inadequacy of the amount and purpose of the common open space as related to the proposed density and type of residential development;

(4) The physical design of the development plan and the manner in which said design does or does not make

adequate provision for public services, provide adequate control over vehicular traffic, and further the amenities of light and air, recreation and visual enjoyment;

(5) The relationship, beneficial or adverse, of the proposed planned residential development to the neighborhood in which it is proposed to be established; and

(6) In the case of a development plan which proposes development over a period of years, the sufficiency of the terms and conditions intended to protect the interests of the public and of the residents of the planned residential development in the integrity of the development plan.

(c) In the event a development plan is granted tentative approval, with or without conditions, the governing body may set forth in the official written communication the time within which an application for final approval of the development plan shall be filed or, in the case of a development plan which provides for development over a period of years, the periods of time within which applications for final approval of each part thereof shall be filed. Except upon the consent of the landowner, the time so established between grant of tentative approval and an[1] application for final approval shall not be less than three months and, in the case of developments over a period of years, the time between applications for final approval of each part of a plan shall be not less than twelve months.

§ 10710. Status of plan after tentative approval

(a) The official written communication provided for in this article shall be certified by the secretary or clerk of the governing body and shall be filed in his office, and a certified copy shall be mailed to the landowner. Where tentative approval has been granted, the same shall be noted on the zoning map.

(b) Tentative approval of a development plan shall not qualify a plat of the planned residential development for recording nor authorize development or the issuance of any building permits. A development plan which has been given tentative approval as submitted, or which has been given tentative approval with conditions which have been accepted by the landowner (and provided that the landowner has not defaulted nor violated any of the conditions of the tentative approval), shall not be modified or revoked nor otherwise impaired by action of the municipality pending an application or applications for final approval, without the consent of the landowner, provided an application for final approval is filed or, in the case of development over a period of years, provided applications are filed, within the periods of time specified in the official written communication granting tentative approval.

(c) In the event that a development plan is given tentative approval and thereafter, but prior to final approval, the landowner shall elect to abandon said development plan and shall so notify the governing body in writing, or in the event the landowner shall fail to file application or applications for final approval within the required period of time or times, as the case may be, the tentative approval shall be deemed to be revoked and all that portion of the area included in the development plan for which final approval has not been given shall be subject to those local ordinances otherwise applicable thereto as they may be amended from time to time, and the same shall be noted on the zoning map and in the records of the secretary or clerk of the municipality.

§ 10711. Application for final approval

(a) An application for final approval may be for all the land included in a development plan or, to the extent set forth in the tentative approval, for a section thereof. Said application shall be made to the official of the municipality designated by the ordinance and within the time or times specified by the official written communication granting tentative approval. The application shall include any drawings, specifications, covenants, easements, performance bond and such other requirements as may be specified by ordinance, as well as any conditions set forth in the official written communication at the time of tentative approval. A public hearing on an application for final approval of the development plan, or part thereof, shall not be required provided the development plan, or the part thereof, submitted for final approval, is in compliance with the development plan theretofore given tentative approval and with any specified conditions attached thereto.

(b) In the event the application for final approval has been filed, together with all drawings, specifications and other documents in support thereof, and as required by the ordinance and the official written communication of tentative approval, the municipality shall, within thirty days of such filing, grant such development plan final approval.

(c) In the event the development plan as submitted contains variations from the development plan given tentative approval, the governing body may refuse to grant final approval and shall, within thirty days from the filing of the application for final approval, so advise the landowner in writing of said refusal, setting forth in said notice the reasons why one or more of said variations are not in the public interest. In the event of such refusal, the landowner may either:

(1) Refile his application for final approval without the variations objected, or

(2) File a written request with the governing body that it hold a public hearing on his application for final approval. If the landowner wishes to take either such alternate action he may do so at any time within which he shall be entitled to apply for final approval, or within thirty additional days if the time for applying for final approval shall have already passed at the time when the landowner was advised that the development plan was not in substantial compliance. In the event the landowner shall fail to take either of these alternate actions within said time, he shall be deemed to have abandoned the development plan. Any such public hearing shall be held pursuant to public notice within thirty days after request for the hearing is made by the landowner, and the hearing shall be conducted in the manner prescribed in this article for public hearings on applications for tentative approval. Within thirty days after the conclusion of the hearing, the governing body shall by official written communication either grant final approval to the development plan or deny final approval. The grant or denial of final approval of the development plan shall, in cases arising under this section, be in the form and contain the findings required for an application for tentative approval set forth in this article.

(d) A development plan, or any part thereof, which has been given final approval shall be so certified without delay by the governing body and shall be filed of record forthwith in the office of the recorder of deeds before any development shall take place in accordance therewith. Upon the filing of record of the development plan the zoning and subdivision regulations otherwise applicable to the land included in such plan shall cease to apply thereto. Pending completion within a reasonable time of said planned residential development or of that part thereof, as the case may be, that has been finally approved, no modification of the provisions of said development plan, or part thereof, as finally approved, shall be made except with the consent of the landowner.

(e) In the event that a development plan, or a section thereof, is given final approval and thereafter the landowner shall abandon such plan or the section thereof that has been finally approved, and shall so notify the governing body in writing; or, in the event the landowner shall fail to commence and carry out the planned residential development within such reasonable period of time as may be fixed by ordinance after final approval has been granted, no development or further development shall taken place on the property included in the development plan until after the said property is resubdivided and is reclassified by enactment of an amendment to the municipal zoning ordinance in the manner prescribed for such amendments in Article VI.

§ 10712. Repealed. 1972, June 1, P.L. —, No. 93, § 13

ARTICLE VIII. ZONING CHALLENGES; GENERAL PROVISIONS [REPEALED]

§§ 10801, 10802. Repealed. 1972, June 2, P.L. —, No. 93, § 13

ARTICLE IX. ZONING HEARING BOARD

§ 10901. Creation of board

Every municipality which has enacted or enacts a zoning ordinance pursuant to this act or prior enabling laws, shall create a zoning hearing board. As used in this act, unless the context clearly indicates otherwise, the term "board" shall refer to such zoning hearing board.

§ 10902. Existing boards of adjustment

Every board of adjustment or board of appeals in existence when this act becomes effective shall thereupon become a zoning hearing board, be known as such, and it and the terms of its members shall continue under and in accordance with the provisions of this article. Matters pending before any board of adjustment or board of appeals at the time this act becomes effective shall continue and be completed under the former law in effect at the time such board took jurisdiction of them.

§ 10903. Membership of board

(a) The membership of the board shall, upon the determination of the governing body, consist of either three or five residents of the municipality appointed by the governing body. The terms of office of a three member board shall be three years and shall be so fixed that the term of office of one member shall expire each year. The terms of office of a five member board shall be three years and shall be so fixed that the term of office of no more than two members of a five member board shall expire each year and of the initial appointments of the two additional members, one shall be appointed for a one year term and one shall be appointed for a two year term. If a three member board is changed to a five member board, the members of the existing three member board shall continue in office until their term of office would expire under prior law. The governing body shall appoint two additional members to the board with terms scheduled to expire in accordance with the provisions of this section. The board shall promptly notify the governing body of any vacancies which occur. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members of the board shall hold no other office in the municipality, except that no more than one member of the board may also be a member of the planning commission.

(b) A five member board shall not be changed to a three member board except upon an affirmative vote on the question by a majority of the electors of the municipality voting thereon at a referendum held at the municipal or general election prior to a year in which the terms of two of the members on the board expire.

§ 10904. Joint zoning hearing boards

Two or more municipalities may, by ordinances enacted in each, create a joint zoning hearing board in lieu of a separate board for each municipality. A joint board shall consist of two members appointed from among the residents of each municipality by its governing body. The term of office of members of joint boards shall be five years, except that of the two members first appointed from each municipality, the term of office of one member shall be three years. When any vacancies occur, the joint board shall promptly notify the governing body which appointed the member whose office has become vacant, and such governing body shall appoint a member for the unexpired portion of the term. Members of the joint board shall hold no other office in the participating municipality, except that no more than one member of the board appointed by any municipality may also be a member of a planning commission of the municipality from which such appointment is made. In all other respects, joint zoning hearing boards shall be governed by provisions of this act not inconsistent with the provisions of this section.

§ 10905. Removal of members

Any board member may be removed for malfeasance, misfeasance or nonfeasance in office or for other just cause by a majority vote of the governing body which appointed the member, taken after the member has received fifteen days' advance notice of the intent to take such a vote. A hearing shall be held in connection with the vote if the members shall request it in writing.

§ 10906. Organization of board

The board shall elect from its own membership its officers, who shall serve annual terms as such and may succeed themselves. For the conduct of any hearing and the taking of any action, a quorum shall be not less than a majority of all the members of the board, but the board may appoint a hearing officer from its own membership to conduct any hearing on its behalf and the parties may waive further action by the board as provided in section 908. The board may make, alter and rescind rules and forms for its procedure, consistent with ordinances of the municipality and laws of the Commonwealth. The board shall keep full public records of its business and shall submit a report of its activities to the governing body once a year.

§ 10907. Expenditures for services

Within the limits of funds appropriated by the governing body, the board may employ or contract for secretaries, clerks, legal counsel, consultants and other technical and clerical services. Members of the board may receive compensation for the performance of their duties, as may be fixed by the governing body, but in no case shall it exceed the rate of compensation authorized to be paid to the members of the governing body.

§ 10908. Hearings

The board shall conduct hearings and make decisions in accordance with the following requirements:

(1) Notice shall be given to the public, the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who

has made timely request for the same. Notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence of ordinance provision, by rules of the board. The governing body may establish reasonable fees, based on cost, to be paid by the applicant and by persons requesting any notice not required by ordinance. In addition to the notice provided herein, notice of said hearing shall be conspicuously posted on the affected tract of land.

(2) The hearings shall be conducted by the board or the board may appoint any member as a hearing officer. The decision, or, where no decision is called for, the findings shall be made by the board, but the parties may waive decision or findings by the board and accept the decision or findings of the hearing officer as final.

(3) The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.

(4) The chairman or acting chairman of the board or the hearing officer presiding shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties.

(5) The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.

(6) Formal rules of evidence shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded.

(7) The board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings and a transcript of the proceedings and copies of graphic or written material received in evidence shall be made available to any party at cost.

(8) The board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials unless the parties are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given an opportunity to be present.

(9) The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within forty-five days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. If the hearing is conducted by a hearing officer, and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties

and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than forty-five days after the decision of the hearing officer. Where the board fails to render the decision within the period required by this subsection, or fails to hold the required hearing within sixty days from the date of the applicant's request for a hearing, the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the municipality shall give public notice of said decision within ten days in the same manner as provided in subsection (1) of this section. Nothing in this subsection shall prejudice the right of any party opposing the application to urge that such decision is erroneous.

(10) A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or mailed to him not later than the day following its date. To all other persons who have filed their name and address with the board not later than the last day of the hearing, the board shall provide by mail or otherwise, brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined.

§ 10909. Board's functions: appeals from the zoning officer

The board shall hear and decide appeals where it is alleged by the appellant that the zoning officer has failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a valid ordinance or map or any valid rule or regulation governing the action of the zoning officer. Nothing contained herein shall be construed to deny to the appellant the right to proceed directly in court, where appropriate, pursuant to Pa.R.C.P., sections 1091 to 1098 relating to mandamus.

§ 10910. Board functions: challenge to the validity of any ordinance or map

The board shall hear challenges to the validity of a zoning ordinance or map except as indicated in section 1003 and subsection (1) (b) of section 1004. In all such challenges, the board shall take evidence and make a record thereon as provided in section 908. At the conclusion of the hearing, the board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.

§ 10911. Repealed. 1972, June 1, P.L. —, No. 93, § 15

§ 10912. Board's functions; variances

The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. Subject to the provisions of section 801, the board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance provided the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions gen-

erally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) That such unnecessary hardship has not been created by the appellant;

(4) That the variance, if authorized, will not alter the essential character of the neighborhood, or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

§ 10913. Board's functions; special exceptions

Where the governing body in the zoning ordinance has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria.

In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

§ 10913.1 Unified appeals

Where the board has jurisdiction over a zoning matter pursuant to sections 909 through 912, the board shall also hear all appeals which an applicant may elect to bring before it with respect to any municipal ordinance or requirement pertaining to the same development plan or development. In any such case, the board shall have no power to pass upon the nonzoning issues, but shall take evidence and make a record thereon as provided in section 908. At the conclusion of the hearing, the board shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court. The provisions of this section shall not apply to cities of the first and second class.

§ 10914. Parties appellant before board

Appeals under section 909 and proceedings to challenge an ordinance under section 910 may be filed with the board in writing by the landowner affected, any officer or agency of the municipality, or any person aggrieved. Requests for a variance under section 912 and for special exception under section 913 may be filed with the board by any landowner or any tenant with the permission of such landowner.

§ 10915. Time limitations; persons aggrieved

No person shall be allowed to file any proceeding with the board later than thirty days after any application for development, preliminary or final, has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal or to limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given. If such person has succeeded to his interest after such approval, he shall be bound by the knowledge of his predecessor in interest.

The failure of anyone other than the landowner to appeal from an adverse decision on a tentative or preliminary plan pursuant to section 709 or from an adverse decision by a zoning officer on a challenge to the validity of an ordinance or map pursuant to section 1005(b) shall preclude an appeal from a final approval except in the case where the final submission substantially deviates from the approved tentative or preliminary approval.

§ 10916. Stay of proceedings

Upon filing of any proceeding referred to in section 914 and during its pendency before the board all land development pursuant to any challenged ordinance, order or approval of the zoning officer or of any agency or body, and all official action thereunder shall be stayed unless the zoning officer or any other appropriate agency or body certifies to the board facts indicating that such stay would cause imminent peril to life or property, in which case the development or official action shall not be stayed otherwise than by a restraining order, which may be granted by the board or by the court having jurisdiction of zoning appeals on petition after notice to the zoning officer or other appropriate agency or body. When an application for development, preliminary or final, has been duly approved and proceedings designed to reverse or limit the approval are filed with the board by persons other than the applicant, the applicant may petition the court having jurisdiction of zoning appeals to order such persons to post bond as a condition to continuing the proceedings before the board. After the petition is presented the court shall hold a hearing to determine if the filing of the appeal is frivolous and is for the purpose of delay. At the hearing evidence may be presented on the merits of the case. After consideration of all evidence presented, if the court determines that the appeal is frivolous and is for the purpose of delay it shall grant the petition. The right to petition the court to order the appellants to post bond may be waived by the appellee but such waiver may be revoked by him if an appeal is taken from a final decision of the court. The question whether or not such petition should be granted and the amount of the bond shall be within the sound discretion of the court.

ARTICLE X. APPEALS

§ 11001. Zoning appeals

The proceedings set forth in this article shall constitute the exclusive mode for securing review of any ordinance, decision, determination or order of the governing body of a municipality, its agencies or officers adopted or issued pursuant to this act.

§ 11002. Repealed. 1978, April 28, P.L. 202, No. 53, § 2(a)[1421], effective June 27, 1978

§ 11003. Validity of ordinance; procedural questions

Questions of an alleged defect in the process of enactment or adoption of any ordinance or map shall be raised by an appeal taken directly from the action of the governing body to the court.

§ 11004. Validity of ordinance; substantive questions; landowner appeals

(1) A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge either:

(a) To the zoning hearing board for a report thereon under section 910 or 913.1; or

(b) To the governing body together with a request for a curative amendment under section 609.1.

(2) The submissions referred to in subsection (1) shall be governed by the following:

(a) The landowner shall make a written request to the board or governing body that it hold a hearing on his challenge. The request shall contain a short statement reasonably informing the board or the governing body of the matters that are in issue and the grounds for the challenge. Such statement shall contain a certification that the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use; provided that this rezoning scheme had reached sufficient particularity to disclose that, if adopted, it would cure the defect in the zoning ordinance attacked by the substantive challenge.

(b) The request may be submitted at any time after the ordinance or map takes effect but if an application for a permit or approval is denied thereunder, the request shall be made not later than the time provided for appeal from the denial thereof. In such case, if the landowner elects to make the request to the governing body and the request is timely, the time within which he may seek review of the denial of the permit or approval on other issues shall not begin to run until the request to the governing body is finally disposed of.

(c) The request shall be accompanied by plans and other materials describing the use or development proposed by the landowner in lieu of the use or development permitted by the challenged ordinance or map. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for evaluating the challenged ordinance or map in the light thereof. Nothing contained herein shall preclude the landowner from first seeking a final permit or approval before submitting his challenge to the board or governing body.

(d) If the submission is made to the governing body under subsection (1)(b), the request shall be accompanied by an amendment or amendments to the ordinance proposed by the landowner to cure the alleged defects therein.

(e) Notice of the hearing required by sections 609.1, 910, or 913.1, whichever is applicable, shall include notice that the validity of the ordinance or map is in question and shall give the place where and the times when a copy of the landowner's request, including the plans submitted pursuant to subsection (2)(c) and the proposed amendments, if any, submitted under subsection (2)(d) may be examined by the public.

(f) The board or the governing body, as the case may be, shall hold a hearing upon the landowner's request pursuant to sections 609.1, 910, or 913.1, whichever is applicable, commencing not later than sixty days after the request is filed unless the landowner requests or consents to an extension of time.

(3) Repealed. 1978, April 28, P.L. 202, No. 53, § 2(a) [1421], effective June 27, 1978.

(4) For purposes of subsection (3)(ii), the landowner's request for a curative amendment is denied when (i) the governing body notifies the landowner that it will not adopt the amendment, or (ii) the governing body adopts another amendment which is unacceptable to the landowner, or (iii) the governing body fails to act on the landowner's request, in which event the denial is deemed to have occurred on the thirtieth day after the close of the last hearing on the request unless the time is extended by mutual consent between the landowner and the municipality.

§ 11005. Validity of ordinance; substantive questions; appeals by persons aggrieved

Persons aggrieved by a use or development permitted on the land of another by an ordinance or map or any provision thereof who desire to challenge its validity on substantive grounds shall first submit their challenge to the zoning hearing board for a report thereon under section 910.

The submission to the board shall be governed by the following:

(a) The aggrieved person shall submit a written request to the board that it hold a hearing on the challenge. The request shall contain a short statement reasonably informing the board of the matters that are in issue and the grounds for the challenge.

(b) The request shall be submitted within the time limitations prescribed by section 915. In order not to unreasonably delay the time when a landowner may secure assurance that the ordinance or map under which he proposes to build is free from challenge, and recognizing that the procedure for preliminary approval of his development may be too cumbersome or may be unavailable, the landowner may advance the date from which time for any challenge to the ordinance or map will run under section 915 by the following procedure: (i) The landowner may submit plans and other materials describing his proposed use or development to the zoning officer for a preliminary opinion as to their compliance with the applicable ordinances and maps. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinon as to its compliance. (ii) If the zoning officer's preliminary opinion is that the use or development complies with the ordinance or map, notice thereof shall be published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall include a general description of the proposed use or development and its location, by some readily identifiable directive, and the place and times where the plans and other materials may be examined by the public. The favorable preliminary opinion of the zoning officer shall be deemed to be a preliminary approval under section 915 and the time therein specified for commencing a proceeding with the board shall run from the time when the second notice thereof has been published.

(c) The board shall hold a hearing upon the aggrieved person's request pursuant to section 910, commencing not later than sixty days after the request is filed. If a hearing has been held by the governing body covering the same matters, at which a stenographic record has been taken, the board shall upon motion of any party accept said record as the record in the case before the board but the board shall not be precluded from taking additional evidence, unless such evidence ought to be excluded under section 908(6).

After submitting his challenge to the board, as provided in clauses (a) and (b), any party aggrieved may take the same to court by appeal.

§ 11006. Applications, decisions and orders not involving the validity of an ordinance; landowner appeals

(1) A landowner who desires to file a zoning application or to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which prohibits or restricts the use or development of land in which he has an interest on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall proceed as follows:

(a) From a decision of the governing body or planning agency under a subdivision or land development ordinance the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable. If the municipality provides a procedure, formal or informal, for the submission of preliminary or tentative plans an adverse decision thereon shall, at the landowner's election, be treated as final and appealable.

(b) From the decision of the governing body or planning agency denying tentative approval of a development plan under section 709(3) or, if tentative approval has been granted, from any adverse decision on an application for final approval, the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable.

(c) To the extent that the board as jurisdiction of the same under section 909 all other appeals shall lie exclusively to the zoning hearing board.

(d) Applications under section 912 and 913 shall be made exclusively to the zoning hearing board.

(2) Appeals to the zoning hearing board pursuant to subsections (1)(a) and (1)(c) shall be filed within thirty days after notice of the decision is issued or, if no decision is made, within thirty days from the date when a decision is deemed to have been made under this act.

(3)(a) Appeals to court may be taken by the landowner from any decision of the governing body or planning agency under subsections (1)(a) and (1)(b), after the decision is issued or, if no decision is made when a decision is deemed to have been made under this act.

(b) Appeals to court from any decision of the zoning hearing board may be taken by any party aggrieved.

§ 11007. Decisions and orders not involving the validity of an ordinance; appeals by persons aggrieved

Persons aggrieved by a use or development permitted on the land of another who desire to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which has permitted the same, on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall first submit their objections to the zoning hearing board under sections 909 and 915. The submission shall be governed by the provisions of section 1005.

Appeals to court from the decision of the zoning hearing board may be taken by any party aggrieved.

§ 11008. Appeals to court; commencement; stay of proceedings

(1) Zoning appeals shall be entered as of course by the prothonotary or clerk upon the filing of a zoning appeal notice which concisely sets forth the grounds on which the appellant relies. The appeal notice need not be verified. The zoning appeal notice shall be accompanied by a true copy thereof.

(2) Upon filing of a zoning appeal, the prothonotary or clerk shall forthwith as of course, send to the governing body, board or agency whose decision or action has been appealed, by registered or certified mail, the copy of the zoning appeal notice together with a writ of certiorari commanding said governing body, board or agency within twenty days after receipt thereof to certify to the court its entire record in the matter in which the zoning appeal has been taken, or a true and complete copy thereof, including any transcript of testimony in existence and available to the governing body, board or agency at the time it received the writ of certiorari.

(3) If the appellant is a person other than the landowner of the land directly involved in the decision or action appealed from, the appellant, within seven days

after the zoning appeal is filed, shall serve a true copy of the zoning appeal notice by mailing said notice to the landowner or his attorney at his last known address. For identification of such landowner, the appellant may rely upon the record of the municipality and, in the event of good faith mistakes as to such identity, may make such service nunc pro tunc by leave of court.

(4) The filing of an appeal in court under this section, shall not stay the action appealed from but the appellants may petition the court having jurisdiction of zoning appeals for a stay. If the appellants are persons who are seeking to prevent a use or development of the land of another, whether or not a stay is sought by them, the landowner whose use or development is in question may petition the court to order the appellants to post bond as a condition to proceeding with the appeal. After the petition is presented the court shall hold a hearing to determine if the filing of the appeal is frivolous and is for the purpose of delay. At the hearing evidence may be presented on the merits of the case. After consideration of all evidence presented, if the court determines that the appeal is frivolous and is for the purpose of delay it shall grant the petition. The right to petition the court to order the appellants to post bond may be waived by the appellee but such waiver may be revoked by him if an appeal is taken from a final decision of the court. The question of the amount of the bond shall be within the sound discretion of the court.

§ 11009. Intervention

Within the thirty days first following the filing of a zoning appeal, if the appeal is from a board or agency of a municipality, the municipality and any owner or tenant of property directly involved in the action appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Rules of Civil Procedure.

§ 11010. Hearing and argument of zoning appeal

If upon motion it is shown that proper consideration of the zoning appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence or may remand the case to the body, agency or officer whose decision or order has been brought up for review or may refer the case to a referee to receive additional evidence provided that appeals brought before the court pursuant to sections 1004 and 1005 shall not be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. If the record does not include findings of fact, or if additional evidence is taken by the court or by a referee, the court may make its own findings of fact based on the record below as supplemented by the additional evidence, if any.

§ 11011. Judicial relief

(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal, only if it determines that:

(a) the municipality has not acted in good faith or made a bona fide attempt in the adoption of its ordinances or maps, or any amendments thereto, to meet the statutory and constitutional requirements for nonexclusionary zoning; or

(b) the ordinance imposes limitations that are not reasonably related to the municipality's authority to determine its physical growth pattern, protect the Commonwealth's public natural resources, coordinate development with the provision of public services, or protect the character of the community. Where municipalities have adopted a joint municipal comprehensive plan and enacted zoning legislation consistent with the joint municipal comprehensive plan within a region pursuant to Articles XI and XI-A, the court, when determining the validity of a challenge to such a municipality's zoning ordinance shall consider the zoning ordinance or ordinances as they apply to the entire region and shall not limit its consideration to the application of the zoning ordinance within the boundaries of the respective municipalities.

(2) If the court, in accordance with the standards provided in subsection (1), finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or, failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order.

In issuing its order the court shall consider the following: (i) the locational suitability of the site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public service facilities or the comprehensive plan and zoning ordinance of the municipality and the county if they exist; (ii) the impact of the proposal on regional housing needs, the transportation network, and the other public services and facilities; (iii) the suitability of the site for the intention of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features; (iv) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse evironmental impacts; and (v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

Upon motion by any of the parties or upon motion by the court, the judge of the court may hold a hearing or hearings to receive additional evidence or employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject to examination or cross-examination by any party. He shall be paid reasonable compensation for his services which may be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

(3) The fact that the plans and other materials referred to in subsection (1) are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits shall not prevent the court from granting the definitive relief authorized in subsection (2) and the court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.

(4) No court shall grant or enforce relief with respect to a substantive challenge without first making an affirmative finding of fact that the landowner's certification required by section 1004(2)(a) has in fact been made and is true and correct.

§ 11012. Repealed. 1971, June 3, P.L. —, No. 6, § 1 (§ 509(a)(178))

ARTICLE XI. JOINT MUNICIPAL PLANNING COMMISSIONS

§ 11101. Legislative finding and declaration of policy

For the purpose of promoting health, safety, morals and the general welfare of the various areas in the Commonwealth through the effective development of such areas, the following powers for the establishment of joint municipal planning commissions are hereby granted.

§ 11102. Creation, appointment and operation of joint municipal planning commission

The governing bodies of two or more municipalities may by ordinance or resolution authorize the establishment and participation or membership in and support of, a joint municipal planning commission. The number and qualifications of the members of such planning commission and their terms and method of appointment or removal shall be such as may be determined and agreed upon by the governing bodies. Members of a joint municipal planning commission shall serve without salary but may be paid expenses, incurred in the performance of their duties. The joint municipal planning commission shall elect a chairman whose term shall not exceed one year and who shall be eligible for reelection. The commission may create and fill such other offices as it may determine. Every joint municipal planning commission shall adopt rules for the transactions, findings and determinations, which record shall be a public record. Each participating or member municipality may from time to time, upon the request of the joint municipal planning commission, assign or detail to the commission any employees of the municipality to make special surveys or studies.

§ 11103. Finances, staff and program

(a) The governing bodies of municipalities shall have the authority to appropriate funds for the purpose of contributing to the operation of a joint municipal planning commission. A joint municipal planning commission, with the consent of all the governing bodies, may also receive grants from the Federal or State governments, or from individuals or foundations, and shall have the authority to contract therewith. Every joint municipal planning commission shall have the power to appoint such employes and staff as it may deem necessary for its work, and contract with planners and other consultants for the services it may require to the extent permitted by its financial resources. Each such commission may also perform planning services for any municipality which is not a member thereof and may charge fees for the work. A joint municipal planning commission may also prepare and sell maps, reports, bulletins or other material and establish reasonable charges therefor.

(b) A joint municipal planning commission may provide planning assistance and do planning work, including surveys, land use studies, urban renewal plans, technical services and other elements of comprehensive planning and planning effectuation programs in and for any participating or member municipality and for this purpose may, with the consent of all the governing bodies, accept and utilize any funds, personnel or other assistance made available by the Federal or State governments or any of their agencies, or from individuals or foundations, and for the purposes of receiving and using Federal or State planning grants for provision of urban planning assistance may enter into agreements or contracts regarding acceptance or utilization of the funds or assistance.

§ 11104. Preparation of comprehensive plan

Every joint municipal planning commission shall prepare and maintain a comprehensive plan, in accordance with the provisions of this act, for the guidance of the continuing development of the area encompassed by the participating or member municipalities.

§ 11105. Cooperation among joint municipal planning commission, municipalities and others

Every joint municipal planning commission shall encourage the cooperation of the participating municipalities in matters which concern the integrity of the comprehensive plan or maps prepared by the commission, and, as an aid toward coordination, all municipalities and public officials shall upon request furnish to the joint municipal planning commission within a reasonable time the available maps, plans, reports, statistical or other information such commission may require for its work.

§ 11106. Established regional planning commission

Municipalities which are presently participating in an existing regional planning commission may elect to comply with and be governed by the provisions of this act.

§ 11107. Saving clause

The passage of this act and the repeal by it of any prior enabling laws relating to regional planning shall not invalidate any regional planning commission created under such other laws. This act, in such respect, shall be deemed a continuation and codification of such prior enabling laws.

ARTICLE XI-A. JOINT MUNICIPAL ZONING

§ 11101—A. General powers

The governing body of each municipality cooperating in a joint municipal comprehensive plan, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal joint municipal zoning ordinances to implement the joint municipal comprehensive plan and to accomplish any of the purposes of this act. For these purposes, a municipality may enact and or adopt a joint municipal zoning ordinance which has been or is to be enacted by each municipality cooperating in the joint municipal comprehensive plan.

§ 11102—A. Compliance with code

The governing body of each municipality cooperating in a joint municipal comprehensive plan and zoning ordinance shall otherwise comply with all applicable sections of the act.

§ 11103—A. Joint municipal comprehensive plan

(a) The governing body of a municipality, by formal action, may advertise a proposed joint municipal comprehensive plan. The municipality shall have sixty days from the date of the advertisement to adopt such a plan.

(b) During this period of time, the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1, nor shall the zoning hearing board be required to give a report requested under section 910 or 913.1, subsequent to the advertisement required by subsection (a) and based upon the municipality's existing zoning ordinance.

§ 11104—A. Intention to enact zoning ordinances

(a) Subsequent to, or simultaneous with, the adoption of a joint municipal comprehensive plan, the governing body of a municipality cooperating in that plan, may declare its intention to enact a zoning ordinance pursuant to section 11101—A by advertising the same. The municipality shall have one hundred twenty days from the date of this advertisement to enact such an ordinance.

(b) During this period of time, the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1, nor shall the zoning hearing board be required to give a report requested under section 910 or 913.1, subsequent to the advertisement required by subsection (a) and based upon the municipality's existing zoning ordinance.

§ 11105—A. Adoption of regional zoning ordinances

(A) The governing body of each municipality participating in the joint municipal comprehensive plan shall adopt the regional zoning ordinance in order for the regional ordinance to be effective.

(B) Once the regional ordinance is effective the municipal zoning ordinance shall be null and void.

§ 11106—A. Amendments to regional zoning ordinance

(A) Amendments to the regional zoning ordinance shall be approved by a simple majority of all participating municipalities including the municipality or municipalities which will be physically affected by the proposed amendment.

(B) The same procedures shall be followed in amending the regional zoning ordinance as are set forth in Article VI.

§ 11107—A. Regional Hearing Board

(A) A Regional Hearing Board is hereby established. It shall possess the same powers and duties with respect to the region as the zoning hearing board presently enjoys pursuant to Article IX.

(B) Each municipality shall appoint one person to serve on the regional hearing board.

§ 11108—A. Intention to withdraw

A municipality may announce its intention to withdraw from the regional zoning ordinance, the Regional Hearing Board and the joint municipal comprehensive plan by passing a resolution stating therein its intention to withdraw. The withdrawal shall not become effective for a period of three years from the date of the passing of the withdrawal resolution.

ARTICLE XII. REPEALS

§ 11201. Specific repeals

The following acts and parts of acts and amendments thereof are repealed to the extent hereinafter specified:

(1) Section 12, act of May 16, 1891 (P.L. 75), entitled * * * [53 P.S. § 1095], as to cities of the second class

A, incorporated towns and townships of the first and second class.

(2) Sections 1151, 1152, 1153, 1154, 1155, 1156, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1711, 1721, 1722, 2706, 2707, 3201, 3202, 3203, 3204, 3205, 3206, 3207, 3208, 3209 and 3210, act of February 1, 1966 (P.L. 1656), known as "The Borough Code" [53 P.S. §§ 46151 to 46156, 46601 to 46609, 46711, 46721, 46722, 47706, 47707, 48201 to 48210], absolutely.

(3) Sections 2001, 3015, 3016, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3107.1, 3107.2, 3108, 3109, 3110, 3111, 3201, 3202 and 3203, act of June 24, 1931 (P.L. 1206), known as "The First Class Township Code" [53 P.S. §§ 57001, 58015, 58016, 58061 to 58068, 58101 to 58111, 58201 to 58203], reenacted and amended May 27, 1949 (P.L. 1955), absolutely.

(4) Sections 2901, 2902, 2903, 2904, 2905, 2906, 3701, 3702, 4001, 4002, 4003, 4004, 4005, 4006, 4101, 4102, 4103, 4104, 4105, 4106, 4107, 4110, 4111, 4112, 4113, 4114, 4120, 4121, 4122, 4123, 4224, 4125, 4126, 4127, 4128 and 4129, act of June 23, 1931 (P.L. 932), known as "The Third Class City Code" [53 P.S. §§ 37901 to 37906, 38701, 38702, 39001 to 39006, 39101 to 39107, 39110 to 39114, 39120 to 39129], reenacted and amended June 28, 1951 (P.L. 662), absolutely.

(5) Sections 1201-A, 1202-A, 1203-A, 1204-A, 1205-A, 1206-A, 1207-A, 1208-A, 1907.1, 1907.2, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2051, 2052, 2053, 2054, 2055, 2056 and 2057, act of May 1, 1933 (P.L. 103), known as "The Second Class Township Code" [53 P.S. §§ 66251 to 66258, 66907.1, 66907.2,

67001 to 67010, 67051 to 67057], reenacted and amended July 10, 1947 (P.L. 1481), absolutely.

(6) The act of April 18, 1945 (P.L. 258), entitled * * * [36 P.S. § 1762], as to cities of the second class A and third class, boroughs, incorporated towns and townships of the first and second class.

(7) Sections 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038 and 2039, act of August 9, 1955 (P.L. 323), known as "The County Code" [16 P.S. §§ 2001 to 2011, 2020 to 2039], absolutely.

(8) Sections 2201 through 2211 and 2220 through 2239, act of July 28, 1953, (P.L. 723), known as the "Second Class County Code" [16 P.S. §§ 5201 to 5211, 5220 to 5239], in so far as they relate to counties of the second class A.

§ 11202. General repeal

All other acts and parts of acts are repealed in so far as they are inconsistent herewith, but this act shall not repeal or modify any of the provisions of the "Public Utility Law," or any laws administered by the Department of Highways of the Commonwealth of Pennsylvania.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 3 1982
ALEXANDER L. STEVAS.
CLERK

No. 81-1781

IN THE

Supreme Court of the United States

October Term, 1981

SOLEBURY TOWNSHIP, SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, J. WALTER LIVEZEY, JR., FRANK J. SORIERO, JR., FRANK C. BOAS, CYRUS R. HOAGLAND and PATRICIA D. KNIGHT, Individually and in Their Respective Official Capacities as Members of the SOLEBURY TOWNSHIP BOARD OF SUPERVISORS, CARL L. LINDSAY, JR., Individually and in His Official Capacity as Solicitor of SOLEBURY TOWNSHIP, and WILLIAM E. MOON,

Petitioners,

v.

HERITAGE FARMS, INC., HERITAGE FARM PARTNERSHIP, CONCEPTS PLUS, INC., and MICHAEL G. LAMELZA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
DILWORTH, PAXSON, KALISH & KAUFFMAN
LOUIS B. KUPPERMAN
2600 The Fidelity Building
Philadelphia, PA 19109

STEVEN L. FRIEDMAN
2600 The Fidelity Building
Philadelphia, PA 19109
(215) 875-7000
Counsel of Record for Respondents

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court exercise its certiorari jurisdiction to review a judgment of the United States Court of Appeals for the Third Circuit which reversed a district court's decision to abstain in a factually novel and admittedly valid civil rights action involving a corrupt course of conduct and an illegal conspiracy by local officials to destroy respondents' economic existence, in which no state policies or concerns are affected, no unsettled questions of state law exist, and no state proceedings are sought to be enjoined?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATUTE INVOLVED 1

COUNTERSTATEMENT OF THE CASE 2

- A. Procedural History 2
- B. Statement of Facts 2

REASONS FOR DENYING THE WRIT 5

- A. The Court of Appeals Correctly Held That the District Court Abused Its Discretion in Abstaining in This Admittedly Valid Civil Rights Action 5
- B. The Third Circuit Properly Rejected the Lower Court's Mechanical Decision to Abstain in This Case 7
- C. The Decision of the Third Circuit Is Not in Conflict With Any Decisions of Other Courts of Appeals and Does Not Warrant Review by This Court 8

CONCLUSION 10

APPENDIX:

- List of Subsidiaries and Affiliates Pursuant to Supreme Court Rule 28.1 11

TABLE OF AUTHORITIES

Cases: Page

Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N. D. Ca. 1978) 8

Burford v. Sun Oil Company, 319 U. S. 315 (1943) 6, 7, 9

Chan v. Town of Brookline, 484 F. Supp. 1283 (D. Mass. 1980) 8

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) 5, 6, 7, 8, 10

Conover v. Montemuro, 477 F. 2d 1073 (3d Cir. 1973) 10

County of Allegheny v. Frank Mashuda Co., 360 U. S. 185 (1959) 10

Curtis v. Everette, 489 F. 2d 516 (3d Cir. 1973), cert. den. sub nom., Smith v. Curtis, 416 U. S. 995 (1974) 3

Dombrowski v. Pfister, 380 U. S. 479 (1965) 9

Donohoe Construction Co., Inc. v. Maryland-National Capital Park and Planning Commission, 398 F. Supp. 21 (D. Md. 1975) 8

Donohoe Construction Co., Inc. v. Montgomery Cty. Council, 567 F. 2d 603 (4th Cir. 1977) 8

Forrest Hills Utility Company v. City of Heath, 539 F. 2d 592 (6th Cir. 1976) 9

Fralin & Waldron, Inc. v. City of Martinsville, Virginia, 493 F. 2d 481 (4th Cir. 1974) 9

Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E. D. Va. 1979) 8

Gipson v. Township of Bass River, 82 F. R. D. 122 (D. N. J. 1979) 8

Gordon v. City of Warren, 579 F. 2d 386 (6th Cir. 1978) ... 8

Hill v. City of El Paso, 437 F. 2d 352 (5th Cir. 1971) 9

Hill Construction Co. v. State of Connecticut, 366 F. Supp. 737 (D. Conn. 1973) 8

Insurance Federation of Pa. v. Supreme Court of Pa., 669 F. 2d 112 (3d Cir. 1982) 3

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Lerner v. Town of Islip, 272 F. Supp. 664 (E. D. N. Y. 1967) 8
Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941) 5, 6, 9
Santa Fe Land Improvement Company v. City of Chula Vista, 596 F. 2d 838 (9th Cir. 1979) 9
Santasucci v. Gallen, 607 F. 2d 527 (1st Cir. 1979) 9
Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D. N. J. 1976) 8
Weiss v. Willow Tree Civic Assoc., 467 F. Supp. 803 (S. D. N. Y. 1979) 8

Statutes:

28 U. S. C. § 2283 9
42 U. S. C. § 1983 ....1, 2, 4

Rules of Court:

Supreme Court Rule 28.1 .... 2, 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is officially reported at 671 F. 2d 743. The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 507 F. Supp. 33.

STATUTE INVOLVED

The Civil Rights Act of 1871, 42 U. S. C. § 1983 (1976):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

COUNTERSTATEMENT OF THE CASE

A. Procedural History

Respondents[1] Heritage Farms, Inc., Heritage Farm Partnership, Concepts Plus, Inc. and Michael G. Lamelza, plaintiffs below, filed this civil rights action on July 23, 1980 for injunctive and declaratory relief and damages from an ongoing conspiracy by petitioners to violate respondents' constitutionally protected rights by impeding, obstructing, delaying and destroying respondents' real estate projects in Solebury Township, Bucks County, Pennsylvania. Petitioners, defendants below, including Solebury Township, its Board of Supervisors, past and present members of the Board, and the Township Solicitor, admitted that the Complaint set forth a valid cause of action against the Township and its Board of Supervisors under 42 U. S. C. § 1983.

Defendants moved to dismiss the Complaint on the ground of abstention or, in the alternative, to dismiss the claims against the individual defendants. On December 19, 1980, shortly after discovery began, the district court dismissed the Complaint on the ground of abstention and did not retain jurisdiction. Respondents filed a timely appeal to the United States Court of Appeals for the Third Circuit which reversed the decision of the district court by judgment entered on February 10, 1982.

B. Statement of Facts

The Third Circuit summarized the facts of this case in its Opinion[2] as follows:[3]

---

[1] Respondents' Statement, pursuant to Supreme Court Rule 28.1, is annexed hereto as the Appendix.

[2] The Opinion of the Third Circuit is set out in the Appendix ("App.") attached to the instant Petition at A1-A10.

[3] The recitation of facts in this subsection were gleaned from the material allegations of the Complaint which were accepted as

The complaint alleges that the various defendants conspired to use their offices to cripple and destroy the plaintiffs' business. Their course of conduct, spanning almost three years, was aimed at preventing the plaintiffs from carrying out plans for various residential developments. The attack was waged on various fronts. The defendants unlawfully denied the necessary governmental approval for certain development projects. Building permits were denied despite the knowledge that the denial of the permits was unlawful under Township ordinances. Escrow monies were not released for work completed. Certificates of occupancy were refused for completed and approved developments. The complaint alleges with great specificity a number of ‘illegal, arbitrary, unreasonable, confiscatory, [and] discriminatory’ acts on the part of the defendants ‘to frustrate, hinder, obstruct, delay and prevent development of plaintiffs' properties solely for the purpose of inflicting economic harm upon plaintiffs under the color of law.’ Plaintiffs' Complaint, ¶ 38,39(i). Individual defendants articulated a personal dislike for plaintiff Lamelza and stated their intent to ‘bankrupt’ him and ‘put him out of business.’ In addition, defendant Boas attempted to block one of plaintiffs' commercial ventures in order to prevent competition with his own nearby retail store. As both a member of the Board of Supervisors and Police Commissioner, Boas ordered illegal, repetitive and harassing inspections of the

---

3. (Cont'd.)

true by the District Court and the Third Circuit for the purposes of the motion to abstain. *See Insurance Federation of Pa. v. Supreme Court of Pa.*, 669 F. 2d 112 (3d Cir. 1982); *Curtis v. Everette*, 489 F. 2d 516 (3d Cir. 1973), *cert. den. sub nom., Smith v. Curtis*, 416 U. S. 995 (1974). The Complaint is reproduced at App. A21-A38.

plaintiffs' projects. Various defendants intentionally made false statements to financial institutions in an attempt to persuade them not to finance plaintiffs' projects. In addition to ruining the plaintiffs' credit rating, defendants mounted an adverse publicity campaign against plaintiffs using false and defamatory statements to curtail the plaintiffs' ability to sell their homes. As a result of the defendants' efforts, the plaintiffs suffered severe financial losses as projects were delayed and aborted. In addition, the plaintiffs have suffered injury to their reputation in the business and financial worlds, as well as in the eyes of the community as a whole.

All parties agree that the complaint states on its face a claim under § 1983, and that the district court had jurisdiction over the case. . . . We must consider whether it was error for the district court to have abstained where there does not exist an unsettled question of state law and where important state policies are not threatened by a decision by a federal court. [App. A3-A4].

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision, reversing the district court's erroneous decision to abstain, follows long standing and controlling precedent, does not conflict with decisions of this Court or any Court of Appeals, and does not present any issue for review by this Court.

A. The Court of Appeals Correctly Held That the District Court Abused Its Discretion in Abstaining in This Admittedly Valid Civil Rights Action.

In rejecting the district court's improper reliance on *Pullman*[4] abstention, the Court of Appeals held that the district court misapplied *Pullman* when it stated that "this dispute can be disposed of by a state court applying state law, thus avoiding a determination by this court of federal constitutional issues." [App. A15].

> [T]he mere presence of a 'potentially dispositive question of state law,' [citation omitted], has *never* been a sufficient basis *in itself* for declining federal jurisdiction under *Pullman*. The doctrine requires that the question of state law be unsettled. [citations omitted].
>
> Neither the district court nor the defendants have pointed to the unsettled question or questions of state law presented by this case. As far as we can discern, there are none. Of course, state law will be involved in this suit, but *Pullman* abstention is certainly not designed to prevent a federal court from applying state law altogether. As one commentator observed: 'Federal and state courts are equally capable of applying *settled* state law to a difficult set of facts.' [citation omitted]. In *Colorado River Water Con-*

---

[4] *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 (1941).

> *servation District v. United States,* 424 U. S. 800 (1976), the Supreme Court found *Pullman* abstention inapplicable in part because '[w]hile state claims are involved in the case, the state law appears to be settled.' 424 U. S. at 815. To the extent that state law is involved in this case—for example, the law governing land use—it is settled state law, and, as such, *Pullman* abstention is inappropriate. (Emphasis in original). [App. A7].

Given the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them", *Colorado River Water Conservation District v. United States, supra,* 424 U. S. at 817, *Pullman* abstention in this case was wholly unwarranted since there are no unsettled issues of state law.

The district court also erroneously relied upon *Burford*[5] abstention when it held that the "traditionally local nature of land use decisions and the danger of unwarranted federal interference with such traditionally local functions" would somehow cause friction "over the administration of purely state affairs." [App. A16].

As the Third Circuit ruled:

> *[T]here is no uniform state policy for land use and development* [in Pennsylvania]—*policies necessarily differ from municipality to municipality.*
>
> The Pennsylvania Municipalities Planning Code does *not* involve the type of uniform and elaborate statewide regulation as was adopted by the State of Texas to govern the drilling of oil wells in *Burford.* Furthermore, there is *no* danger that a federal court decision in this case will disrupt Pennsylvania's policies or plans with respect to land use. Here, as in

---

[5] *Burford v. Sun Oil Company,* 319 U. S. 315 (1943).

> *Colorado River Water Conservation, 'no questions bearing on state policy are presented for decision.* Nor will decision of the state claims impair efforts to implement state policy as in *Burford.*' 424 U. S. at 816. *The policies embodied in the Municipalities Planning Code are not being attacked—it is rather the application of those policies by a single township that is at issue.* In fact, if it is found that the defendants acted unlawfully, the state and local policies will be vindicated.
>
> Perhaps more importantly, *this case is not simply a land use case.* Rather the plaintiffs have alleged that members of the Board have used their governmental offices to further an illegal conspiracy to destroy plaintiffs' constitutional rights to conduct a legitimate business. *The Pennsylvania Municipalities Planning Code simply does not address such behavior.* Nor do we think that defamation and attempting to persuade financial institutions not to lend to the appellants are simple matters of land use and development policy. In short, *Burford* abstention has no place in this case. (Emphasis added). [App. A8-A9].

The district court clearly abused its discretion and repudiated its constitutional jurisdiction since there are no unsettled questions of state law involved and no state policy is affected by a decision of the federal court.

B. The Third Circuit Properly Rejected the Lower Court's Mechanical Decision to Abstain in This Case.

The district court, without factual analysis or findings, ignored the clear allegations of the Complaint and stereotyped respondents' cause of action as a "local land use dispute". The lower court then mechanically decided to abstain from the case because it involved land use claims.

The Third Circuit reversed this erroneous ruling holding that:

> It is incumbent upon district courts, faced with a claim arising out of land use questions, *to examine the facts carefully to determine what the essence of the claim is.* If it is an unlawful conspiracy like the one alleged here, the *mere presence of land use issues should not trigger a mechanical decision to abstain.* (Emphasis added). [App. A10].

Such a mechanical rule of abstention violates this Court's repeated admonition that abstention "is the exception, not the rule". *Colorado River Water Conservation District v. United States, supra,* 424 U. S. at 813. It also conflicts with numerous land use related civil rights decisions in which the federal courts refused to abstain from exercising their constitutional jurisdiction.[6]

C. The Decision of the Third Circuit Is Not in Conflict With Any Decisions of Other Courts of Appeals and Does Not Warrant Review by This Court.

Contrary to petitioners' inference, no conflict exists among the Circuits concerning the abstention doctrine, nor is the Court of Appeals' decision in this case inconsistent with any other Circuit Court rulings.

---

[6] *See, e.g., Gordon v. City of Warren,* 579 F. 2d 386 (6th Cir. 1978); *Donohoe Construction Co., Inc. v. Montgomery Cty. Council,* 567 F. 2d 603 (4th Cir. 1977); *Chan v. Town of Brookline,* 484 F. Supp. 1283 (D. Mass. 1980); *Gipson v. Township of Bass River,* 82 F. R. D. 122 (D. N. J. 1979); *Fralin & Waldron, Inc. v. County of Henrico,* 474 F. Supp. 1315 (E. D. Va. 1979); *Barbaccia v. County of Santa Clara,* 451 F. Supp. 260 (N. D. Ca. 1978); *Sixth Camden Corp. v. Evesham Township,* 420 F. Supp. 709 (D. N. J. 1976); *Donohoe Construction Co., Inc. v. Maryland-National Capital Park and Planning Commission,* 398 F. Supp. 21 (D. Md. 1975); *Hill Construction Co. v. State of Connecticut,* 366 F. Supp. 737 (D. Conn. 1973); *Weiss v. Willow Tree Civic Assoc.,* 467 F. Supp. 803 (S. D. N. Y. 1979); *Lerner v. Town of Islip,* 272 F. Supp. 664 (E. D. N. Y. 1967).

The cases cited by petitioners from other Circuits are all clearly factually distinguishable from, and legally consistent with, the decision of the Third Circuit. None of the cases cited by petitioners "involve allegations of pervasive corruption and fraud" as are involved here. The Court of Appeals, in noting the novel factual setting of this case, observed that "[t]he high level of malevolent conduct in this case is quite different than the issue in *Pullman*" and that "defendants' illicit conduct is quite different than the gravamen of the complaint in *Burford* . . ." [citations omitted]. [App. A9].

None of the cases cited by petitioners even remotely involve the corrupt actions and type of conduct at issue in this case. *Santasucci v. Gallen*, 607 F. 2d 527 (1st Cir. 1979), was a declaratory judgment action seeking to enjoin state officials from interfering with plaintiff's intentions to demonstrate at a nuclear power facility. *Fralin & Waldron, Inc. v. City of Martinsville, Virginia*, 493 F. 2d 481 (4th Cir. 1974), involved a constitutional challenge to a provision of the City's zoning code for which the property owner was remanded to state court. *Hill v. City of El Paso*, 437 F. 2d 352 (5th Cir. 1971), was an anti-injunction act case, 28 U. S. C. § 2283, which was dismissed on the basis of *Dombrowski v. Pfister*, 380 U. S. 479 (1965). *Forrest Hills Utility Company v. City of Heath*, 539 F. 2d 592 (6th Cir. 1976), is not a land use decision, but a *de facto* condemnation case involving a private utility company. Lastly, *Santa Fe Land Improvement Company v. City of Chula Vista*, 596 F. 2d 838 (9th Cir. 1979), was also a *de facto* condemnation case in which the city down-zoned the plantiff's property without payment of compensation.

This case does not involve "land use regulation", but rather an abuse of power under color of law which the Civil Rights Act was intended to remedy. A "district court cannot abdicate its responsibility as an article III court to determine facts which are of constitutional significance", *Conover v. Montemuro*, 477 F. 2d 1073, 1081 (3d Cir. 1973), but rather, has a duty to exercise its jurisdiction. *Colorado River Water Conservation District v. United States, supra; County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185 (1959). The failure of the district court to do so in this case was a clear abuse of discretion. The Court of Appeals' decision reversing the district court was manifestly correct, in complete accord with the decisions of this Court and its sister Circuits, and does not present any question or issue for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN L. FRIEDMAN
2600 The Fidelity Building
Philadelphia, PA 19109
Counsel of Record for Respondents

Of Counsel:
DILWORTH, PAXSON
KALISH & KAUFFMAN
LOUIS B. KUPPERMAN
2600 The Fidelity Building
Philadelphia, PA 19109

Appendix

APPENDIX

Pursuant to Supreme Court Rule 28.1, the corporate respondents, Heritage Farms, Inc., and Concepts Plus, Inc., have no non-wholly owned subsidiaries and are not affiliated with any other entities other than Heritage Farm Partnership, a Pennsylvania limited partnership, and co-respondent herein.